

INTERESTS AND POLICY CLASHES IN CONFLICT OF LAWS

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In several recent articles¹ Professor Cowan has suggested that the development of the law in many fields would be immensely clarified and aided if we recognized that frequently there are involved here new types of interests—group interests—in addition to individual and social or public-at-large interests. Simultaneously, Professor Currie² in a series of articles has advanced the thesis that supposed conflict of law questions should be analyzed in terms of the interests of the various states involved in order to determine if in fact there is a true conflicts issue raised and, if so, how to dispose of that issue. My purpose in this essay is to attempt to combine these two suggestions, if possible, in order to explore some of their extremely interesting ramifications in choice of law problems in conflict of laws.

I

The ordinary civil action in a common-law jurisdiction employing the adversary system normally has quite obviously embodied a clash of individual interests. The plaintiff demands something from the defendant which the latter refuses to yield—be it money damages, a specific chattel, a piece of land, or the doing or stopping of an act or course of conduct. The law in the nineteenth century often attempted to solve its problems in terms of this conflict of individual interests. By the end of that century, and certainly by the beginning of the twentieth century, we realized that a law suit even between two private persons often involved not only their conflicting individual interests but also, as Pound

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1. See Cowan, *The Impact of Social Security on the Philosophy of Law: The Protection of Interests Based on Group Membership*, 11 RUTGERS L. REV. 688 (1957); Cowan, *Group Interests*, 44 VA. L. REV. 331 (1958). In some areas group interests may be relatively unimportant. See COHEN, ROBSON, & BATES, PARENTAL AUTHORITY: THE COMMUNITY AND THE LAW 202-3 (1958).

2. See Currie, *Survival of Actions: Adjudication versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205 (1958); Currie, *Married Women's Contracts: A Study in Conflicts-of-Law Method*, 25 U. CHI. L. REV. 227 (1958); Currie, *On The Displacement of the Law of the Forum*, 58 COLUM. L. REV. 964 (1958); Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9 (1958); Currie, *Notes on Methods and Objectives in the Conflict of Laws*, a paper presented at the Conflict of Laws Roundtable of the Association of American Law Schools, Chicago, Ill., Dec. 29, 1958, reprinted in 8 DUKE L.J. 171 (1959). See also Kelso, *The Process of Analyzing Choice-of-Law Problems*, 1959 WASH. U. L.Q. 37.

so carefully pointed out and elaborated,³ social interests: interests of the state and of the entire community or public at large in maintaining peace, order, stability, fostering certain highly regarded social and individual values, checking or regulating or controlling other social and individual values. Frequently these social interests clashed with each other or with the individual interests present in a law suit. The job of the law then was to prevent these clashes, to work out necessary compromises and adjustments, to determine what were the individual and social interests a law suit revealed and which of these interests should prevail, and to what extent, over others where conflicts arose. As government undertook more and more regulation and control of private business enterprise and individual conduct and thought, these conflicts of individual interests with social interests both multiplied and became more readily apparent. The pace of this development was further accelerated when government not only regulated or controlled but also began to own and operate businesses, to carry on itself many activities formerly left almost entirely to individual and private initiative.

Overlooked at times, perhaps, in these striking and dramatic developments of our present century, was the fact that another type of interest, easily confused with but really very different from either individual or social interests, was present in many legal problems of our modern life—the group interest. Group interests are especially evident in the form of claims made either by or against those in a group or a status or role relationship. They resemble individual interests for they are made by individuals, not the state or the entire public at large, but, unlike individual interests, they are made on behalf of individuals as or in a group. The distinctive thing about them is their group or associative nature which makes them quite different from either an individual or a social, public-at-large, interest. Frequently they are asserted against all of society. The group demands that society grant it special rights, privileges, or treatment—the right to a fair price or wage, to a job, to old age security. Because of their group nature, it is all too easy to confuse them with true social interests—a confusion often fostered by the group asserting the interest—but unlike a true social interest the group interest is often a purely selfish one for the betterment mainly of the group at the expense of the rest of society, not for the betterment

3. See Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1 (1943); Pound, *A Survey of Public Interests*, 58 HARV. L. REV. 909 (1945); Pound, *Individual Interests of Substance—Promised Advantages*, 59 HARV. L. REV. 1 (1945); POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW, ch. 6 (rev. ed. 1954); Patterson, *Some Reflections on Sociological Jurisprudence*, 44 VA. L. REV. 395 (1958); Patterson, *Pound's Theory of Social Interests*, in INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES 558 (1947); PATTERSON, JURISPRUDENCE: MEN AND IDEAS OF THE LAW § 4.61 (1953); THE JURISPRUDENCE OF INTERESTS; SELECTED WRITINGS OF MAX RÜMELIN AND OTHERS (1948); STONE, THE PROVINCE AND FUNCTION OF LAW, chs. XX-XXIII (1946).

of the entire community or all of society (although the group seldom hesitates to assert that its interests and those of society-at-large are the same and identical).

Group interests have become especially prominent in contemporary life as more and more we turn to the state to supply us with things—often in the nature of benefits or bounties as well as necessities and services—which we deem essential and feel we are entitled to as a matter of right, because of the special services our particular group—union, farmer, oil producer, employer—believes it renders to all of society, or the payments the group may have actually made for these benefits or services in many cases. Various groups demand that society guarantee them a job, a fair price for their work, security against unemployment, illness, old age, and other hazards of life. The social security interest is perhaps a vast amalgamation of widely differing group interests, and our failure thus far to differentiate these interests and to work out appropriate treatment and benefits for each group has caused much difficulty and dissatisfaction, as in workmen's compensation.

The rapid growth and extension of the insurance principle—the spreading of risks over a large but definite group—is another striking illustration. Insurance obviously is not an individual matter, but neither is it one for the entire community—risk of loss is shared not by everyone but by a definite selected group of policyholders. The group nature of insurance is, of course, strikingly apparent in so called “group insurance,” but it also is present even in the case of individual insurance policies where there is a status or group relation of insureds, insurers, and beneficiaries. The entire law of liability for unintentional torts has been transformed by widespread adoption of the insurance or group sharing of risk approach in such fields as work injuries and automobile accident injuries. Here, too, we often tend to overlook the group rather than social interest of many demands—employees, unions, employers, insurers, each represent a group, not the entire public. The public interest perhaps is simply to obtain the goods or services it desires at the lowest possible costs, not to pay directly or indirectly for injuries to workers on the job.

If Professor Cowan is right—and I believe he is—then the task which Pound has called social engineering becomes vastly more difficult and complex for the law than perhaps we may have formerly believed. We first of all must identify and separate from each other the various interests—individual, group, social—involved in our legal problem—by no means an easy task, for interests tend to overlap, and group and individual interests always seek to identify themselves with the larger social interests.⁴ Then our job has but begun. We must ascertain to

4. Thus special concessions for groups under the federal income tax are always sought on the ground that what benefits the favored group will benefit the public

what extent there are clashes or conflicts among or between the identified interests. Next we must determine who in our society—legislature, administrative agency, court, executive official—is to decide the conflicts, to make compromises and adjustments, to assign priorities, to determine the values of the competing interests and which shall prevail and to what extent. The problems of valuation alone present perplexing questions—the interdependency of ends and means, the relative importance of both reason and feeling or intuition, the need for acute semantic analysis.⁵ In one way or another—perhaps all too often by a kind of unconscious and muddled half-thought-out process—we do decide upon an adjustment of the clashing interests—an adjustment embodied in what we may call the policy (or public policy) of the state, expressed either in a legislative enactment, administrative rule or order, judicial decision, or edict of the market place, or of Mrs. Grundy. The question of who should make this evaluation or adjustment of the conflicts is another matter to which we have given far too little thought. Which conflicts are justiciable, which fall within the broad scope of legislative policy, which should be given to administrative adjudication or rule making, which may best be left to the mechanism of the market place or to some private group, are matters we simply have no definite objective criteria for deciding.⁶ A just, decent, and orderly adjustment of these clashes of interests demands that each interest—individual, group, social—be adequately represented and have a chance to present its case before a decision is made. Yet courts have rarely, if ever, devised adequate methods for handling such multi-party clashes, and legislative and administrative hearings frequently are so dominated and overwhelmed by the clamors of powerful groups that social or individual

as a whole. See Cary, *Pressure Groups and the Revenue Code: A Requiem in Honor of the Departing Uniformity of the Tax Laws*, 68 HARV. L. REV. 745 (1955); Surrey, *The Congress and the Tax Lobbyist—How Special Tax Provisions Get Enacted*, 70 HARV. L. REV. 1145 (1957); Johnson, *The Last Taxpayer*, 30 TAXES 181 (1952); Blum and Johnson, *1913-2013, A Hundred Years of Income Taxes*, 33 TAXES 41 (1955); Kramer, *The "Uneasy Case" in Jurisprudence*, 44 VA. L. REV. 379 (1958).

5. See Kramer, *The "Uneasy Case" in Jurisprudence*, 44 VA. L. REV. 379 (1958); Kramer, *Values in Land Use Controls: Some Problems*, 7 AM. U. L. REV. 1 (1958); FULLER, *THE LAW IN QUEST OF ITSELF* (1940); Fuller, *American Legal Philosophy at Mid-Century*, 6 J. LEGAL ED. 457 (1954); Note, *Natural Law for Today's Lawyer*, 9 STAN. L. REV. 455 (1957); *Symposium—Ethical Values and the Law in Action*, 12 OHIO ST. L.J. 1-68 (1951); Fuller, *Reason and Fiat in Case Law*, 59 HARV. L. REV. 376 (1946); Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958); Fuller, *Human Purpose and Natural Law*, 3 NATURAL L. F. 68 (1958); Nagel, *On the Fusion of Fact and Value: A Reply to Professor Fuller*, *id.* at 77; Fuller, *A Rejoinder to Professor Nagel*, *id.* at 83.

6. See Fuller, *Some Reflections on Legal and Economic Freedoms—A Review of Robert L. Hale's "Freedom Through Law"*, 54 COLUM. L. REV. 70 (1954); Fuller, *Freedom—A Suggested Analysis*, 68 HARV. L. REV. 1305 (1955); M. POLANYI, *THE LOGIC OF LIBERTY: REFLECTIONS AND REJOINDERS* (1951).

interests may be overlooked or neglected.⁷ Markets may cease to function in a representative manner if dominated by powerful groups, and groups may callously disregard individual and social rights and interests.

II

Suppose, however, that we have determined by some means what the policy of the state shall be in handling and working out these clashes of various kinds of interests. What happens when we move into the realm of conflict of laws? Here we face clashes of interests between individuals, groups, and communities located, not all in one sovereign state, but in two or more such states. In a sense we move from the three-dimensional universe of individual, group, and social interests, into a multi-dimensional universe. We have not simply conflicts of interests—individual, group, and social—among themselves and with each other; we have a clash between the policy of one state—how it adjusts the clashing interests—and the policy of another state—the different solution that state has for a similar clash of like interests. And, of course, more than two states may be involved; we may have policy conflicts here of several states.

The word "policy" is not one I am quite happy about, because in law it so often, especially as public policy, has little or no real meaning. In conflict of laws, in particular, public policy frequently is used to conceal the real factors influencing a decision to apply the law of the forum instead of foreign law, or represents simply a blind, intuitive grasping by a judge for what seems to him a fair result in a case, or even may amount to no more than a total failure by a court to attempt to rationalize its decision and solve the tough problems presented by a given case.⁸ Yet I know of no better word to express a state's answer to the clashes of interests that arise in a purely internal situation.

Professor Currie has addressed himself to the question whether the policy solution adopted by a state or the forum for a clash of competing

7. See Jaffe, *The Effective Limits of the Administrative Process: A Reevaluation*, 67 HARV. L. REV. 1105 (1954); Jaffe, Book Review, 65 YALE L.J. 1068 (1956); *Symposium—The Growth of the Administrative Process: A Reappraisal*, 16 FED. B.J. 443 (1956); Parker, *Why Do Administrative Agencies Exist? A Reappraisal*, 45 GEO. L.J. 331 (1957); Carrow, *Current Problems in Administrative Law*, 9 VA. L. WEEKLY DIGEST 1 (1958); Kramer, *id.* at 26; B. Schwartz, *Administrative Justice and Its Place in the Legal Order*, 30 N.Y.U.L. REV. 1390 (1955); Cole, *Administrative Agencies and Judicial Powers*, 44 A.B.A.J. 953 (1958); L. Schwartz, *Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility*, 67 HARV. L. REV. 436, 473 (1954). See note 4 *supra*.

8. See Paulsen & Sovern, "Public Policy" in the Conflict of Laws, 56 COLUM. L. REV. 969 (1956). Cf. Nussbaum, *Public Policy and the Political Crisis in the Conflict of Laws*, 49 YALE L.J. 1027 (1940); Neuner, *Policy Considerations in the Conflict of Laws*, 20 CAN. BAR REV. 479 (1942); Yntema, *The Objectives of Private International Law*, 35 CAN. BAR REV. 721 (1957); Katzenbach, *Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law*, 65 YALE L.J. 1087 (1956).

interests of various kinds where all the interests and factors involved are entirely local or internal should be extended in time and space, so to speak, to cover an identical clash of like interests where there are some interests or factors which relate to other, foreign states. He suggests that, first of all, of course, we must correctly identify the competing interests, and determine the state's (forum's) policy for a purely domestic clash of these interests. Then, if counsel raise the issue in a proper and timely manner,⁹ we must identify the foreign elements, interests, or factors involved in our case and the state or states to which they are connected, and if properly briefed by counsel, determine the policy of the other state or states for a purely domestic clash of these same interests. Having ascertained local (or forum) and foreign law or policy, and the interest clashes involved in these policies, we then see if the policies of the forum and of the other states conflict—if they do not, there may well be no conflicts issue. If their policies do differ, so there apparently is a conflicts problem, the next step is to ascertain, so far as possible, from all possible sources, the reasons (or governmental interests) behind the policy of each state—why did it prefer this interest to that, why did it make this type of compromise or adjustment, why did it subordinate the individual to the group interest or vice versa, ignore the public interest, etc. By ascertaining the reasons (or interests) behind each state's policy, we frequently obtain guidance—perhaps conclusive evidence—about whether the policy in question should be extended in time or space to cover a clashing of interests situation involving non-local elements. In many instances, this type of approach may reveal that the apparent conflict of policy is nonexistent because the policy of one state clearly extends to a case with foreign elements like ours, while the policy of the other state as clearly does not extend to this situation.¹⁰ Or if, in some cases, the policy of neither state may extend to a situation with such foreign elements, there may be a gap, so to speak, between their policies into which our case falls.¹¹ Then, so far as either state is concerned, it may be indifferent, from the stand-

9. Cf. *Walton v. Arabian American Oil Co.*, 233 F.2d 541 (2d Cir.), cert. denied, 352 U.S. 872 (1956); *Leary v. Gledhill*, 8 N.J. 260, 84 A.2d 725 (1951); *Cuba R.R. Co. v. Crosby*, 222 U.S. 473 (1912). See Currie, *On the Displacement of the Law of the Forum*, 58 COLUM. L. REV. 964 (1958).

10. Cf. *Grant v. McAuliffe*, 41 Cal.2d 859, 264 P.2d 944 (1953). But cf. *Orr v. Ahern*, 107 Conn. 174, 139 Atl. 691 (1928); *Yount v. National Bank of Jackson*, 327 Mich. 342, 42 N.W.2d 110 (1950); *Sumner v. Brown*, 312 Pa. 124, 167 Atl. 315 (1933); *Friedman v. Greenberg*, 110 N.J.L. 462, 166 Atl. 119 (1933); *Rathgeber v. Sommerhalder*, 112 N.J.L. 546, 171 Atl. 835 (1934); *Bohenek v. Niedzwiecki*, 142 Conn. 278, 113 A.2d 509 (1955).

11. Cf. *Marie v. Garrison*, 13 Abb. N. Cas. 210 (N.Y. 1883); *Ormsby v. Chase*, 290 U.S. 387 (1933); *Dalton v. McClean*, 137 Me. 4, 14 A.2d 13 (1940). But cf. *Alaska Airlines, Inc. v. Stephenson*, 217 F.2d 295 (9th Cir. 1954). See Currie, *supra* note 9, at 1012-20; Currie, *Survival of Actions, Adjudication versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205, 229-32 (1958).

point of furthering its policy, how this particular case is decided. Also, we may discover there is no real policy conflict because the basic policies of the two states are really similar and differ only in minor, relatively unimportant details and formalities.¹² Finally, there again may appear to be a clash of policies because each state for legitimate reasons and governmental interests desires to extend its policy to cover our case, despite the foreign elements involved in it, and the policies of the two states differ as to how the competing interests should be adjusted and handled. Here there is an overlapping or clashing of states' policies.

Even in the last situation, Currie warns us,¹³ we may not have a true conflicts situation because the policy clash may disappear upon further analysis. In many instances the alleged policy clash is about an issue which, to use Currie's phrase—one he admits is not a wholly happy choice of language¹⁴—does not furnish the "rule of decision" for the case in question.¹⁵ Instead, it relates to a minor, subordinate, subsidiary problem—often a question of status—does a person belong to a group whose interests are given a preferred position under the forum's statutory policy. In such situations, I think, perhaps the true explanation for the lack of a real policy clash often is that we do not look to the law or policy of the other state for a solution of the same competing interests as are involved in the policy solution of the forum.

For example, the forum may be asked to rescind a contract for a basic mistake of law. If the alleged mistake was made about the law of another state, clearly the forum must determine what the law of the other state is about which the alleged error occurred in order to decide whether there actually was a mistake of law made by the party in question.¹⁶ But the forum has no reason to look into the competing interests behind the law of the foreign state which was the subject of the alleged mistake. The forum desires only to know what that law *is*, not why that law is what it is. Or the forum may wish to find out in an automobile accident suit if the drivers involved complied with the rules of the road of a foreign state so far as driving on the right or left side of the road is concerned, if the accident occurred in the foreign state. Again, the forum is not concerned with the why of the foreign rule of the road, the reasons

12. Compare *Kinney Loan & Finance Co. v. Sumner*, 159 Neb. 57, 65 N.W.2d 240 (1954) with *Personal Finance Co. v. Gilinsky Fruit Co.*, 127 Neb. 450, 255 N.W. 558 (1934), *cert. denied*, 293 U.S. 627 (1935). Cf. *Pritchard v. Norton*, 106 U.S. 124 (1882); MODEL EXECUTION OF WILLS ACT § 7. See Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941); Note, *Preserving the Inviolability of Rules of Conflict of Laws by Statutory Construction*, 49 HARV. L. REV. 319 (1935).

13. See Currie, *supra* note 9, at 1012-25.

14. *Id.* at 1021 n. 163.

15. *Ibid.*

16. Cf. *Haven v. Foster*, 9 Pick, 112 (Mass. 1829). Or the forum may wish to decide a question of devolution of its land, and this may depend upon whether an alien heir's homeland permits inheritance by Americans of land there. See *In re Knutzen*, 31 Cal.2d 573, 191 P.2d 747 (1948).

and interests behind the policy expressed by it, or whether the foreign rule may differ from the forum's rule and policy and reasons and interests involved therein. The forum merely seeks to find a standard of conduct which its (the forum's) law uses to determine the liability of defendant under the *forum's* law.¹⁷ Of course, sometimes the forum may decide that its rules of conduct apply to foreign conduct because of the reasons and interests behind its statutory rule of conduct.

Similarly, in a workmen's compensation case the forum's statute may award compensation to a "widow" of a deceased employee. The alleged widow may base her claim solely upon a so-called marriage ceremony performed by a tribal witch doctor in the jungles of Africa years ago, a marriage recognized as valid in that African locality. Even assuming such a marriage is not given recognition as such for most purposes in the forum, it still may allow an award to the widow. The conflict of policy over this type of marriage is only an apparent one—the reasons behind the policy of the African state recognizing such a ceremony, the clashing interests involved, obviously bear no real relationship to the policy and reasons therefor and clashing interests at stake in granting or denying an award to the alleged widow here. Of course, the court may decide that the reasons and governmental interests behind the forum's statutory policies for workmen's compensation require that only the forum's law of marriage determine the validity of the alleged marriage. If so, there will be no reference to the foreign law of marriage. On the other hand, suppose by foreign marriage law as well as the forum's marriage law the marriage is invalid. Still, the forum may consider plaintiff a "widow" for purposes of workmen's compensation, ignoring the foreign marriage law, because the reasons and governmental interests involved in the statutory policy of the award of workmen's compensation may well warrant payment of compensation to her as a "widow" even if not married for other purposes. The validity or invalidity of the foreign marriage has such effect as the forum chooses to give it, considering the forum's statutory policies, the reasons and governmental interests behind them, and the individual, group, and social interests involved.¹⁸

17. So, too, the forum may refer to foreign law to see if certain conduct, such as the transaction of business, is permissible on Sundays when the conduct occurred in the foreign state, not the forum. *Adams v. Gay*, 19 Vt. 358 (1847); *O'Rourke v. O'Rourke*, 43 Mich. 58, 4 N.W. 531 (1880); *Naylor v. Conroy*, 46 N.J. Super. 387, 134 A.2d 785 (App. Div. 1957). Of course, the forum may decide (no doubt erroneously) that the reasons and governmental interests behind the statutory policy of its Sunday Blue laws require that the policy be applied even to transactions occurring in foreign states, at least if local residents are involved, or perhaps if performance is related to the forum. *Cf. Hill v. Wilker*, 41 Ga. 449 (1871).

18. *Cf. Sutton v. Lieb*, 342 U.S. 402 (1952); *Masocco v. Schaaf*, 234 App. Div. 181, 254 N.Y. Supp. 439 (1931); *Konieczny v. J. Kresse Co.*, 234 App. Div. 517, 256 N.Y. Supp. 275 (1932). *But cf. Vergnani v. Guidetti*, 308 Mass. 450, 32 N.E.2d 272 (1941). See also *Smithsonian Institution v. St. John*, 214 U.S. 19 (1909); *Hood v. McGehee*, 237 U.S. 611 (1915); *Olmstead v. Olmstead*, 216 U.S. 386 (1910).

One of the great virtues of Currie's thesis, it seems to me, is that it enables us to distinguish those cases and situations where there are real conflict problems, actual clashes of different states' policies for the handling of identical competing interests, from spurious conflict cases, where such clashes disappear upon analysis, because: either (1) the policy of neither state applies, (2) the policy of only one state applies, (3) the policies of the states are identical, or (4) foreign law is not looked to as a rule of decision, so the reasons for its policy, the clashing interests reflected in it, are irrelevant to decision of the instant case. By so doing it may well eliminate or at least radically simplify such tantalizing questions as those of *renvoi* and characterization—a consummation devoutly to be wished. Characterization can never be wholly eliminated but its special conflicts problems may be avoided. *Renvoi* may disappear because we look only to internal law for a state's policy. We apply foreign law only after deciding the forum's policy is inapplicable and the foreign state's policy is applicable, in view of the reasons and governmental interests behind these policies and the elements in our case local to each state involved. Therefore, only the internal law, so to speak, of the foreign state is ever applied here. Where neither state's policy is really applicable, we apply the forum's law, unless the reasons and governmental interests behind the forum's policy indicate that to apply it is too unfair because it was never intended for a situation with foreign elements like ours and therefore would work a manifest injustice here.

Currie himself, following both judicial opinions and scholars in the field of conflicts,¹⁹ has spoken in terms of the interest of the forum and each state involved in a situation which includes foreign elements. I have felt it desirable to employ a slightly different terminology here and to substitute at times for "interest" (or "governmental interest"), as Currie uses it, the phrase "policy" of the state and the "reasons" behind that policy (instead of the "interests" of the state which are reflected in its policy). My reason for doing so is that I desire to avoid the confusion that might result if the same word, "interest," were used in two rather different contexts, referring, on the one hand (as I and other writers in jurisprudence have done) to the individual, group, and social interests, whose competing and clashing claims created the compromise and adjustment reflected in the state's policy, and on the other hand (as Currie and other conflict writers have done), to the *reasons* why the state has selected a policy which compromises and adjusts the various competing interests in this particular manner, and the *reasons* why the policy may be applied to a case having foreign elements. Unintentionally, perhaps, Currie may be misleading when he refers to these "reasons" behind the policy and its application to cases with foreign elements as the "interest"

19. See notes 20-30, 89-111 *infra*.

of the state or government in the case to be decided, even if he means thereby the economic, political, social, administrative, and other causes or factors ("interests" in his terminology) which led the state to adopt the particular policy in question. On the other hand, the word "reasons" is not an entirely satisfactory substitute, because to a large degree the reasons are subsumed in a statement of the policy. In any event, I agree with him, irrespective of the difference in terminology, that the critical analysis here is to determine whether the reasons or governmental interests behind the state's policy are such that the state has a logical, rational, legitimate cause to apply its policy to the case in question, in spite of the foreign elements involved in the case, because the local elements of the case—the parties, the subject matter, the transaction, the accident, the injury—bear a rational relationship to the reasons and interests behind the policy of the state.

This type of approach is not a simple one. It frequently requires determination of four policies: (1) the forum's policy and reasons and governmental interests involved therein in a wholly local situation, (2) the forum's policy in a similar case involving certain non-local elements, (3) the policy and reasons and governmental interests involved therein of another state in a like situation where all elements involve only that state, and (4) the policy of this state in a like situation where some of the elements involve another state.

III

Clearly, the success or failure of this approach to conflicts cases depends upon our ability to determine with a reasonable degree of precision the reasons (or governmental interests) behind a state's policy. Only then can we ascertain whether the reasons or governmental interests bear a legitimate relationship to the local elements of the case so that its policy presumably extends in time and space to this particular case. How do we go about making this determination? Fundamentally it is nothing more or less than the familiar problem of construction and interpretation of statutes and prior judicial decisions.

Here I suggest that the jurisprudence of interests, especially as developed by Pound and refined by Cowan, may frequently be of great help in throwing light upon the reasons (or governmental interests) behind the state's policy. If that policy is, as I believe, the outgrowth of clashes of individual, group, and social interests, if it is a legislative, judicial or administrative attempt to compromise, adjust, or prevent these clashes of interests, then the better we can identify these interests, their real nature, their conflicts, the better we can grasp the legitimate reasons and governmental interests behind the policy in question.

This proposal to look behind the law or policy of a state to ascertain the reasons or governmental interests involved therein, the clashing in-

terests found there, is, of course, by no means an original one. Beale, whose views have become the target for so much of contemporary criticism by scholars, in one of his last articles, foresaw this development and indicated his approval of it—indeed he showed a willingness and eagerness to adapt his supposedly rigid views to recognition of this type of approach to choice of law issues.²⁰ He pointed out that what he termed social-economic factors might well be decisive in determining the constitutionality, at least, of choice of law decisions by state courts, so far as the United States Supreme Court was concerned. Many others, Cook,²¹ Lorenzen,²² Cavers,²³ Cheatham,²⁴ Reese,²⁵ Paulsen,²⁶ Harper,²⁷ Freund,²⁸ Hancock,²⁹ to name but a few,³⁰ have urged a frank rec-

20. Beale, *Social Justice and Business Costs—A Study in The Legal History of Today*, 49 HARV. L. REV. 593, 608-9 (1936), discussing *Alaska Packers Assn v. Industrial Accident Comm.*, 294 U.S. 532 (1935), and *Young v. Masci*, 289 U.S. 253 (1933): "These cases . . . mark the emergence of a distinctly sociological jurisprudence in the decisions of the Supreme Court. . . . It has been the purpose of the author . . . to forecast a movement of social-economic thought which is already beginning to take effect upon the law of today."

21. Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L.J. 457 (1924), reprinted in COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS*, ch. 1 (1942).

22. Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 YALE L.J. 736 (1924); Lorenzen, *Tort Liability and the Conflict of Laws*, 47 L.Q. REV. 483 (1931).

23. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933); Cavers, *The Two "Local Law" Theories*, 63 HARV. L. REV. 822 (1950). *But cf.* Cavers, Book Review, 56 HARV. L. REV. 1170 (1943).

24. Cheatham & Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959 (1952); Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, 58 HARV. L. REV. 361 (1945).

25. See note 24 *supra*.

26. Paulsen & Sovern, "Public Policy" in the Conflict of Laws, 56 COLUM. L. REV. 969 (1956).

27. Harper, *Policy Bases of the Conflict of Laws: Reflections on Rereading Professor Lorenzen's Essays*, 56 YALE L.J. 1155 (1947).

28. Freund, *Chief Justice Stone and the Conflict of Laws*, 59 HARV. L. REV. 1210 (1946).

29. Hancock, *Choice-of-Law Policies in Multiple Contact Cases*, 5 U. TORONTO L.J. 133 (1943).

30. See also Katzenbach, *Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law*, 65 YALE L.J. 1087 (1956); Ehrenzweig, *The Place of Acting in Intentional Multistate Torts; Law and Reason versus the Restatement*, 36 MINN. L. REV. 1 (1951); Ehrenzweig, *Alternative Actionability in the Conflict of Laws of Enterprise Liability*, 63 JURID. REV. 39 (1951); Shuman & Prevezer, *Torts in English and American Conflict of Laws: The Role of the Forum*, 56 MICH. L. REV. 1067 (1958); Morris, *The Proper Law of a Tort*, 64 HARV. L. REV. 881 (1951); Nussbaum, *Public Policy and the Political Crisis in the Conflict of Laws*, 49 YALE L.J. 1027 (1940); Yntema, *The Hornbook Method and the Conflict of Laws*, 37 YALE L.J. 468 (1928); Yntema, *The Objectives of Private International Law*, 35 CAN. BAR REV. 721 (1957); Neuner, *Policy Considerations in the Conflict of Laws*, 20 CAN. BAR REV. 479 (1942); Rheinstein, *The Place of Wrong: A Study in the Method of Case Law*, 19 TUL. L. REV. 4 (1944); Heilman, *Judicial Method and Economic Objectives in Conflict of Laws*, 43 YALE L.J. 1082 (1934); Briggs, *Utility of the Jurisdictional Principle in a Policy Centered Conflict of Laws*, 6 VAND. L. REV. 667 (1953); Briggs, *The Need for the "Legislative Jurisdictional*

ognition that the social, economic, political reasons (or governmental interests) behind the policy or law of a state must and should be ascertained, if possible, in order to help to decide the extent to which the particular law or policy covers cases involving non-local elements.

In some instances—unfortunately all too few at present—this job may be a relatively simple one. The legislature in a statute embodying the state's policy may clearly indicate that the policy is to apply when certain foreign elements are present³¹ or is to apply only if certain local elements are present.³² If these are the critical elements in our case, we need look no further to decide if the state's policy does or does not extend to our case which involves these particular foreign or local elements. We know beyond all doubt what the legislature wished, and presumably its wishes are conclusive, absent some state or federal constitutional barrier. Thus in workmen's compensation statutes coverage is usually extended by express language to out-of-state, on-the-job injuries involving local employees and employers.³³ Other state statutes sometimes limit their coverage only to cases involving certain key local elements.³⁴

It is along these lines, I believe, that much can be accomplished in the future. Draftsmen of future legislation might well emulate the practices of contemporary careful draftsmen of contracts and other private documents.³⁵ The latter, almost as a matter of course, include a clause specifying what state's law is to govern interpretation and often other questions arising out of or in connection with the contract or document (such as inter vivos trusts of movables) in question. True, these clauses

Principle" in a Policy Centered Conflict of Laws, 39 MINN. L. REV. 517 (1955); Nutting, *Suggested Limitations of the Public Policy Doctrine*, 19 MINN. L. REV. 196 (1935); Smith, *Torts and the Conflict of Laws*, 20 MODERN L. REV. 447 (1957); Kelso, *supra* note 2; EHRENZWEIG, *CONFLICT OF LAWS* § 5 (1959). *But cf.* Goodrich, *Public Policy in the Law of Conflicts*, 36 W. VA. L. REV. 156 (1930).

31. For example, most state workmen's compensation laws cover accidents occurring outside the state. See Roos, *The Problem of Workmen's Compensation in Air Transportation*, 6 J. AIR L. 1 (1935). *Cf.* UNIFORM COMMERCIAL CODE § 1-105. Certain of the Uniform Laws attempt to deal with conflict problems. See the MODEL EXECUTION OF WILLS ACT § 7; UNIFORM SMALL LOAN LAW § 18; and the UNIFORM STOCK TRANSFER ACT § 22(1). *Cf.* N. C. GEN. STATUTES § 58-28 (1950); FLA. STAT. ANN. § 625.01(1)(a) (1956).

32. *Cf.* CODE OF VA. § 8-650 (1950), limiting actions for right of privacy to persons (or their heirs) resident in the state, or to cases where portrait or picture is used within the state.

33. See note 31 *supra*.

34. See note 32 *supra*.

35. *Cf.* Seeman v. Phila. Warehouse Co., 274 U.S. 403 (1927). See *Symposium—The Preventive Law of Conflicts*, 21 LAW & CONTEMP. PROB. 427-605 (1956); Note, *Choice of Law by Contractual Stipulation*, 16 U. CHI. L. REV. 157 (1948); Note, *Commercial Security and Uniformity Through Express Stipulations in Contracts as to Governing Law*, 62 HARV. L. REV. 647 (1949); Rheinstein, Book Review, 15 U. CHI. L. REV. 478 (1948); Cheatham, Book Review, 48 COLUM. L. REV. 1267 (1948); Rheinstein, *Conflict of Laws in the Uniform Commercial Code*, 16 LAW & CONTEMP. PROB. 114, 133-8 (1951).

may not always be fully effective,³⁶ but at least they are a step in the direction of what might well be called the preventive law of conflicts. So, too, frequently lawyers advise clients deliberately to plan transactions so as to locate all possible elements in one state only.³⁷ Again, such plans are not always successful,³⁸ but there is little reason for not at least foreseeing such problems and doing all possible to avoid or solve them in advance. The scope for private law-making here, however, is obviously limited at best. Evasion of strong protective state policies—fraud on the law³⁹—will not be tolerated; and one can hardly apply a planning technique to unforeseen tort claims and suits. Here is a promising area for the alert legislative draftsman. Even if he cannot foresee all possible choice-of-law questions, he can surely, in analyzing the clashes of interests involved and the policy he wishes embodied in his proposed law, give thought to the extent in time and in space, so to speak, of his policy, keeping in mind the reasons and interests behind his policy. There seems little excuse for the almost complete legislative default and silence in this area today.

I do not mean that the legislation should take the form of simple choice-of-law rules—the place of tort or of making a contract, etc. Such legislation would do far more harm than good, since it totally ignores the reasons (and interests) behind the basic policy of the statute.⁴⁰

To a certain, and perhaps as yet undetermined, extent, there may be federal constitutional barriers to this type of legislative action. The Supreme Court has, to say the least, not always spoken or acted consistently in this area.⁴¹ In the absence of further congressional legislation,

36. Cf. *Fricke v. Isbrandtsen Co.*, 151 F. Supp. 465 (S.D.N.Y. 1957); *Owens v. Hagenbeck-Wallace Shows Co.*, 58 R.I. 162, 192 Atl. 158 (1937). See Yntema, *Autonomy in Choice of Law*, 1 AM. J. COMP. L. 341 (1952); Cook, "Contracts" and the Conflict of Laws: "Intention" of the Parties, 32 ILL. L. REV. 899 (1938), *Some Further Remarks*, 34 ILL. L. REV. 423 (1939); Note, *Free Will in Conflict of Laws, Legal Transaction Superseding Territorial Law and Receiving Foreign Law*, 6 TUL. L. REV. 454 (1932); Notes, 54 HARV. L. REV. 663 (1941), 10 LA. L. REV. 346 (1950), 57 COLUM. L. REV. 553 (1957), 62 HARV. L. REV. 647 (1949); Levin, *Party Autonomy; Choice-of-Law Clauses in Commercial Contracts*, 46 GEO. L.J. 260 (1958); Ehrenzweig, *Adhesion Contracts in the Conflict of Laws*, 53 COLUM. L. REV. 1072 (1953); EHRENZWEIG, CONFLICT OF LAWS § 41 (1959).

37. See Symposium—*The Preventive Law of Conflicts*, 21 LAW & CONTEMP. PROB. 427-605 (1956).

38. *Ibid.*

39. See Note, *Fraud on the Law—The Doctrine of Evasion*, 42 COLUM. L. REV. 1015 (1942); CHEATHAM, GOODRICH, GRISWOLD & REESE, CONFLICT OF LAWS 519-20 (4th ed. 1957).

40. See note 118 *infra*.

41. See pp. 549-57 *infra*, and Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9 (1958); Cheatham, *Federal Control of Conflict of Laws*, 6 VAND. L. REV. 581 (1953); Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1 (1945); Dean, *The Conflict of Conflict of Laws*, 3 STAN. L. REV. 388 (1951); Harper, *The Supreme Court and the Conflict of Laws*, 47 COLUM. L. REV. 883 (1947); Rheinstejn, *The Constitutional Bases of Jurisdiction*, 22 U. CHI. L. REV.

my own view is that the Court, at least so far as the full faith and credit clause and the requirements of due process of law here are involved, should strike down attempts by state legislatures or courts to extend state policy to cases with out-of-state elements only when there is a complete absence of any rational relationship at all between the state policy and the reasons or governmental interests involved therein and the local elements of the case. Perhaps the Court has not always followed such a restricted view of its function here, but recent cases do, I think, show a definite acceptance of this viewpoint.⁴²

In addition, attempts to apply state policies in such a way as to discriminate unfairly in favor of local citizens or residents or against foreign residents or citizens may and should, I think, be properly stricken down by the Supreme Court as violations by states of the privileges and immunities⁴³ or equal protection guarantees⁴⁴ of the Constitution—an area so far little explored. The fictional distinction between residents and citizens of states in our federal system might well be buried in deserved oblivion.⁴⁵ And attempts to apply state policies to situations

775 (1955); Dodd, *The Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws*, 39 HARV. L. REV. 533 (1926); Hilpert & Cooley, *The Federal Constitution and the Choice of Law*, 25 WASH. U. L.Q. 27 (1939); Langmaid, *The Full Faith and Credit Required for Public Acts*, 24 ILL. L. REV. 383 (1929); Moore & Oglebay, *The Supreme Court and Full Faith and Credit*, 29 VA. L. REV. 557 (1943); Ross, *Has the Conflict of Laws Become a Branch of Constitutional Law?*, 15 MINN. L. REV. 161 (1931); Ross, "Full Faith and Credit" in a Federal System, 20 MINN. L. REV. 140 (1936); Overton, *State Decisions in Conflict of Laws and Review by the United States Supreme Court under the Due-Process Clause*, 22 ORE. L. REV. 109 (1943); Abel, *Administrative Determinations and Full Faith and Credit*, 22 IOWA L. REV. 461 (1937); Notes, 35 COLUM. L. REV. 751 (1935), 45 YALE L.J. 339 (1935); EHRENZWEIG, CONFLICT OF LAWS §§ 8-10, 40 (1959).

42. See pp. 544, 549 *infra*.

43. U.S. CONST. art. IV, § 2. Cf. *Blake v. McClung*, 172 U.S. 239 (1898); *Kentucky Finance Corp. v. Paramount Auto Exch. Corp.*, 262 U.S. 544 (1923); *Toomer v. Witsell*, 334 U.S. 385, 395 (1948); *Travis v. Yale & Towne Mfg. Co.*, 253 U.S. 60 (1920); *Mullaney v. Anderson*, 342 U.S. 415 (1952); *Quong Ham Wah Co. v. Industrial Acc. Comm'n*, 184 Cal. 26, 192 Pac. 1021 (1920), *writ of error dismissed*, 255 U.S. 445 (1921) (The reasoning and result of this case are open to question (see note 45 *infra*) for the discrimination may have been a reasonable one); *Hughes v. Fetter*, 341 U.S. 609 (1951); *First Nat. Bank v. United Air Lines*, 342 U.S. 396 (1952). The last two decisions deal with the closely related but separate question of the effect of the Constitution upon the right of access to state courts in "transitory" causes of action having foreign aspects. See note 110 *infra*.

44. U.S. CONST. amend. XIV, § 1. Cf. *Truax v. Raich*, 239 U.S. 33 (1915); *Tukashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948). See *Tussman & Tenbroek, The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

45. The real problem is whether the classification is a reasonable one. Does residence, apart from citizenship, have any significance which makes a distinction between residents and non-residents reasonable? Cf. *Douglas v. New Haven R. Co.*, 279 U.S. 377 (1929); *La Tourette v. McMaster*, 248 U.S. 465 (1919); *New York Life Ins. Co. v. Head*, 234 U.S. 149 (1914). Absent such a significance, a discrimination based on residence is one based on citizenship so far as the states of the union are concerned. See note 43 *supra*. Cf. *Chambers v. Baltimore & Ohio R.R.*, 207 U.S. 142 (1907).

involving foreign factors antedating any local connection with the particular case may well raise questions of impairment of contract obligations and of unfairness of retroactive legislation amounting to serious due process claims ⁴⁶—problems on which there is little if any law at present.

None of these constitutional issues, however, should or do, I think, arise where there is a rational relationship between a state's legislative policy settling a clash of interests in a given situation and the local elements, whatever they may be, in the situation. The scope for legitimate state legislative action here is abroad, if draftsmen are bold enough and wise enough to act.

Actually, most statutes—and also judicially created rules of law and policy—ignore completely possible problems raised by foreign elements.⁴⁷ Statutes usually are phrased in terms of “every contract,” “every deed,” “every action,” etc. And the legislative history of statutes, even where it can be investigated to any extent (state materials are often meager here), is equally apt to be silent on these problems. Also, statutory language and legislative history (especially in the state legislatures as distinguished from Congress) are usually quite ambiguous or confusing or unrevealing concerning the reasons and governmental interests behind enactment of the statute in question. The same is often true so far as ascertaining the reasons and governmental interests behind judicially created rules of law, such as the non-survival of actions against tortfeasors. What should we do then to determine the reasons and governmental interests involved in a state's policy for settling clashes of interests? Sometimes, prior judicial opinions may cast light on this problem—but here, too, the light is often flickering and dim. If the language of the statute, its legislative history, and prior judicial decisions interpreting the statute, fail to give a satisfactory answer here—and unfortunately this is usually the case—we are left quite at sea, to say the least. In fact, the problem becomes so difficult that it may be suggested ⁴⁸ that it is better to abandon this whole type of approach in favor of a simple, albeit arbitrary, rule, easily applied by judges and

46. See U.S. CONST. art. I, § 10. Cf. *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 433-5 (1957) (dissenting opinion); *Yarborough v. Yarborough*, 290 U.S. 202, 213 (1933) (dissenting opinion); *Dean v. Dean*, 241 N.Y. 240, 149 N.E. 844 (1925); *Aetna Life Ins. Co. v. Dunken*, 266 U.S. 389 (1924) (see note 98 *infra*). See Currie, *Married Women's Contracts: A Study in Conflicts-of-Law Methods*, 25 U. CHI. L. REV. 227, 230 n. 12, 257, n. 55 (1958); Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9 (1958).

47. See Cheatham, *Sources of Rules for Conflict of Laws*, 89 U. PA. L. REV. 430, 448-50 (1941); Cheatham & Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959, 961-9 (1952); Cook, “Contracts” and the Conflict of Laws: “Intention” of the Parties, 32 ILL. L. REV. 899, 908 (1938); Note, *Preserving the Inviolability of Rules of Conflict of Laws by Statutory Construction*, 49 HARV. L. REV. 319 (1935).

48. Cf. Cavers, Book Review, 56 HARV. L. REV. 1170 (1943). *But cf.* Cavers, *The Two “Local Law” Theories*, 63 HARV. L. REV. 822 (1950).

lawyers to solve these hard cases. Perhaps so, but I doubt the wisdom of this. Conscientious judges and lawyers are not apt blindly to follow rules, however simple, which seem to them to lead to harsh, unfair results in particular cases. Ways will be found to get around the simple rules in order to achieve a just decision. The simple rules then become riddled with exceptions, delusive in their simplicity, often traps for the unwary, and serve mainly to conceal the real grounds for the decision. They are manipulated by able judges in various ways—public policy,⁴⁹ characterization,⁵⁰ fraud on the law and evasive schemes,⁵¹ substance and procedure,⁵² the place of making or of performance or of injury or of the tort. Simple rules contain ambiguous terms—place of making⁵³ or of performance, intention of the parties. And competing rules are developed for identical problems, as in contracts.⁵⁴

Absent any decisive clues in statutory language, legislative history, or prior judicial interpretative opinions, we have little choice except to fall back upon general logic and reasoning as well as a consideration of the relationship of the policy in question to certain basic interests in the community. Analysis of several concrete cases, based upon actual court decisions, may be of help before we proceed further in our discussion.

Suppose a married woman⁵⁵ at her home in state *A*, the forum, signs a guarantee of her husband's credit in favor of a partnership doing business in state *B*. She gives the document to her husband, who mails it to the firm in state *B*. The firm, relying upon the guarantee, fills orders for its wares placed by the husband, delivering the goods either directly to the husband or to a railroad for shipment to him at his expense.

49. See note 8 *supra*. Cf. *Union Trust Co. v. Grosman*, 245 U.S. 412 (1918).

50. Cf. *Herzog v. Stern*, 264 N.Y. 379, 191 N.E. 23, *cert. denied*, 293 U.S. 597 (1934); *Levy v. Daniels' U-Drive Auto Renting Co.*, 108 Conn. 333, 143 Atl. 163 (1928); *Graham v. Wilkins*, 145 Conn. 34, 138 A.2d 705 (1958). *Compare* *Dyke v. Erie Ry.*, 45 N.Y. 113 (1871) with *Pittsburgh, C.C. & St. L. Ry. v. Grom*, 142 Ky. 51, 133 S.W. 977 (1911). See Shavelson, *Survival of Tort Actions in the Conflict of Laws: A New Direction?*, 42 CALIF. L. REV. 803, 809 n. 22 (1954); Yntema, *The Objectives of Private International Law*, 35 CAN. BAR REV. 721, 727 (1957).

51. See note 39 *supra*.

52. Cf. Cook, "Substance" and "Procedure" in the Conflict of Laws, 42 YALE L.J. 333 (1933); Morgan, *Choice of Law Governing Proof*, 58 HARV. L. REV. 153 (1944); Ailes, *Substance and Procedure in the Conflict of Laws*, 39 MICH. L. REV. 392 (1941); Note, 47 HARV. L. REV. 315 (1933).

53. *Compare* *Mutual Life Ins. Co. v. Liebing*, 259 U.S. 209 (1922) with *New York Life Ins. Co. v. Dodge*, 246 U.S. 357 (1918). See Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 182 (1933).

54. Cf. *Auten v. Auten*, 308 N.Y. 155, 124 N.E.2d 99 (1954); *Jones v. Metropolitan Life Ins. Co.*, 158 Misc. 466, 286 N.Y. Supp. 4 (Sup. Ct. 1936).

55. Based upon *Milliken v. Pratt*, 125 Mass. 374 (1878). See Currie, *Married Women's Contracts: A Study in Conflicts-of-Law Method*, 25 U. CHI. L. REV. 227 (1958); Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L.J. 457 (1924); Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933).

When the husband fails to pay the firm for these wares, the firm sues the wife in state *A* on her guarantee. A statute of state *B* provides that "every married woman shall henceforth be as competent to bind herself by contract as if she were unmarried." A statute of state *A* provides that "no married woman shall bind herself by contract as surety or for the accommodation of her husband or any third person."

Neither statute by its language indicates the reasons and governmental interests behind its policy or the extent to which it extends in time or space where extra-state elements are involved in a case.⁵⁶ There are no helpful prior judicial decisions. What are possible reasons and clashing interests which may be found in the different policies of the two states? The policy of state *A*, of course, is based upon an old common-law rule, whose purpose is buried beyond hope of recall in antiquity. Indeed, it is very possible that the original purpose of the policy has long since ceased to be meaningful in modern civilization of twentieth-century America. Still, we must do the best we can here. Currie,⁵⁷ quite logically, assumes that the reason for state *A*'s policy is a belief that married women need special protection because they are peculiarly susceptible and prone to make rash, improvident contracts of suretyship, particularly under the influence of their husbands. State *A*, of course, generally believes in freedom of contract, security of transactions, in protecting all reasonable expectations of promisees, but it subordinates this interest in security of transactions to the special interest of a particular group—married women—giving them unusual protection here. Interests of creditors as a group are made to yield to the interests of a special, favored protected group of debtors, married women. State *B*, presumably has a contrary policy for opposite reasons. Currie further assumes⁵⁸ an arbitrary four factors as the critical ones: (1) domicile, residence, nationality of the wife; (2) domicile, residence, nationality, place of business of the creditor; (3) place of the transaction—where the contract is made or to be performed; and (4) the place where the action is brought.

If, like Currie, we can arbitrarily limit ourselves to a discussion of these interests, reasons, and factors alone, then we can readily agree to his suggested solution. The policy of state *A* should apply whenever the married woman is a resident of *A* or of any other state having a like policy for the protection of married women. The policy of state *B* applies whenever either party is a resident of *B*.⁵⁹ The difficulty, of

56. In the actual case (*supra* note 55) between the time of the transaction and the filing of the suit, state *A* changed its law so that it was identical with that of state *B*. This factor was probably the decisive factor, quite properly, which led the forum to hold the wife liable. See *Union Trust Co. v. Grosman*, 245 U.S. 412, 417 (1918); Currie, *supra* note 55, at 229-30.

57. Currie, *supra* note 55, at 230.

58. *Id.* at 231-2.

59. *Id.* at 254-9.

course, as Currie recognizes, is that absent an explicit legislative declaration to this effect, any such limitations are an arbitrary assumption. There may be other reasons and governmental interests behind the policies of *A* and *B*.

Perhaps *A* cared not at all about married women but, responding to the wishes of a special group of creditors—professional sureties—enacted this statute to prevent the all-too-frequent substitution of a wife for a professional surety as a guarantor for a husband's credit. Thus *A*'s policy is one to regulate creditors here, not debtors. Or perhaps state *A* felt its courts were too often thrust into family affairs when wives were sureties for husbands, that such transactions were too productive of perjury and fraudulent transactions, so that the courts of *A* should not be forced to try such actions. Or such suretyship transactions may be too prone to lead to husbands and wives having title to property really owned by them either held by others on secret or oral trusts for them or placed in the names of their children. Similar conjectures may be made about the reasons and interests behind the policy of *B*. Perhaps the policy of *B* was really meant to aid married women, to encourage them to take a more active part in business affairs, to add to their financial knowledge about their husbands' businesses in cases of early widowhood, to enable them to enter the business of suretyship. Or perhaps *B* felt that a contrary policy encouraged fraud and perjury in its courts, led to husbands placing all property in the names of their wives. Or perhaps the policy was an attempt to aid and foster small family businesses which could not otherwise obtain needed credits.

We have, of course, ignored any possible distinctions between domicile and residence.⁶⁰ Suppose the married couple had a store in *A*, but lived in *C*? Or the creditor lived in *D*, but had his factory in *B*? More important, what about time factors? What if state *A*⁶¹ changed its statute to one in accord with *B*'s between the time of the husband's default and the initiation of the creditor's law suit, or the trial of the case, or the rendering of final judgment? Or what if the married debtors changed their residence or domicile from *A* to *B* or even a third state between the time of execution or of performance or of default and the time of initiation of the suit, or of the trial or verdict? Or what if the creditor similarly changed the place of his business, residence, or domicile? Even if one can ascertain the reasons and governmental interests behind the policy of *A* or *B* accurately, it may not always be easy to decide if these give *A* or *B* a legitimate cause for applying local policy to the case in question, involving certain foreign elements.

Is the solution in such cases simply, in the absence of other evidence to the contrary, to do as Currie has done, work out a moderate, rational

60. Cf. Reese & Green, *That Elusive Word, "Residence,"* 6 VAND. L. REV. 561 (1953); Reese, *Does Domicile Bear a Single Meaning?*, COLUM. L. REV. 589 (1955).

61. See note 56 *supra*.

approach, based upon the assumption that the reasons and governmental interests behind the state's policy are the most probable and logical ones? Perhaps so. Before reaching definite conclusions, let us examine another concrete case.

Four men,⁶² all residents of state *A*, while on a holiday motor trip in state *B*, are driving in two cars which collide in state *B*, killing the driver of one of them, severely injuring the others. An administrator is appointed in state *A* for the estate of the deceased driver. The three injured parties, their claims for damages being rejected by the administrator, file suit in state *A* against the estate for damages caused by the automobile accident. State *B* follows the common-law rule that tort actions do not survive the death of the tortfeasor. State *A* by statute has abolished this rule.

What are the reasons and governmental interests behind the different policies of the two states? State *A* wished to favor the individual interests of the injured persons, the public interest in making certain such persons and their families did not become public charges, the interests of the group of those injured in automobile accidents. The reasons and interests involved in the policy of *B* are again shrouded in the mists of history. Perhaps the most rational one is that finally set forth by Currie⁶³—protection of the group interests of creditors, heirs, kin, legatees, devisees of the dead tortfeasor. Currie⁶⁴ further assumes the four critical elements are: (1) domicile or residence of decedent; (2) domicile or residence of plaintiff; (3) place of the wrong; and (4) place where the action is brought. He also assumes⁶⁵ that either domicile of the decedent in *B* or ancillary administration there of his estate are the two vital connecting factors for the groups *B*'s policy seeks to protect. On this basis, *A*'s policy extends to situations where any injured person is a resident of that state. *B*'s policy covers situations where the deceased was a resident of *B* or where there is ancillary administration of his estate in *B* because he left property with a situs there.

Once again, absent a more specific legislative or judicial statement of reasons, interests, and intentions, we can greatly broaden the scope of our problem by further speculation. If there is liability insurance, what about the chief place of business or place of incorporation of the insurer—does it do business in *A* or *B*? If there is liability insurance, of course, then the estate, creditors, heirs, legatees cannot possibly suffer if recovery is allowed, and all basis for applying the policy of state *B*

62. Based upon *Grant v. McAuliffe*, 41 Cal.2d 859, 264 P.2d 944 (1953). See note 10 *supra*; Currie, *Survival of Actions: Adjudication versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205 (1958); Sumner, *Choice of Law Governing Survival of Actions*, 9 HASTINGS L.J. 128 (1958); CALIFORNIA LAW REVISION COMMISSION, RECOMMENDATION AND STUDY RELATING TO CHOICE OF LAW GOVERNING SURVIVAL OF ACTIONS (1957).

63. Currie, *supra* note 62, at 219-22.

64. *Id.* at 218.

65. *Id.* at 222.

for their protection vanishes.⁶⁶ What about domicile as distinguished from residence of the parties? What about a change in residence or domicile by any of the plaintiffs after the accident, but prior to trial or judgment? What is the reason or interest behind our entire law of tort liability in automobile accident cases—to punish bad drivers (immaterial here), to deter other potential careless drivers (immaterial here), to compensate injured persons fully, to be certain no accident forces a state to expend public funds to care for any victims or their families, to spread risks of loss as widely as possible, to set up standards of conduct, to give men protection against their fellows?

In all these cases we have individual, public, and group interests clashing and forcing a state to adopt a policy to cope with this clash. In the automobile case it is hard to find any possible rational legitimate reason or governmental interest behind the policy of *B* which would warrant *B*'s desiring to apply its policy to this case. And the reasons or interests behind the policy of *A* certainly give it reasonable cause to extend its policy to this situation. The same result can, of course, be reached by quite different reasoning. We can start with the rigid choice-of-law rule that the place of injury determines all substantive matters of tort law. We can still, however, apply the law of *A*, not *B*, because the policy of *B* is too strongly counter to the local public policy of *A*,⁶⁷ or because the issue here may be characterized, not as tort, but as administration of an estate,⁶⁸ or because the issue is labeled one of procedure, governed by the law of *A*, the forum.⁶⁹ Or *A* may, perhaps erroneously, determine that the whole law of *B*, in a case involving so many factors connected with *A*, would apply the internal law of *A* on this issue if suit were brought in *B* (as it probably could not be). Or *A* might even argue that the place of injury is *A*, because this is where the disabled, damaged plaintiffs reside and are suffering. All these devices ignore, however, the really crucial factors—the clash of interests behind the policies of *A* and *B*, and the reasons for these policies.

Yet determination of the interest clashes and reasons behind a state's policy cannot and should not be made a mere mechanical application of a pat, neat formula. Unless we are careful, in a desire to achieve a simple, easy solution, this is what will often happen in tough cases.

IV

Suppose that an analysis along the lines here suggested finally reveals a real conflicts case—a situation where the different policies of at least two states for legitimate reasons may be applied because of factors in the

66. Cf. *In re Vilas' Estate*, 166 Ore. 115, 133, 110 P.2d 940, 947-8 (1941).

67. See note 8 *supra*.

68. See note 50 *supra*.

69. See note 52 *supra*.

case connected with each state. What then? Currie⁷⁰ argues that the preferable, the only defensible solution is for the forum to apply its own law. So too, if the policy of neither state really applies, so there is a gap rather than a conflict, then, if dismissal of the suit on ground of forum non conveniens is not possible or desirable,⁷¹ Currie⁷² argues that the forum should again apply its own law and policy, unless the reasons and governmental interests behind that policy clearly indicate its inapplicability to a situation with the foreign elements of the given case, so that the policy is appropriate solely for purely local application.

Currie emphatically—too emphatically perhaps—rejects the idea that in case of a clash of policies, a court should weigh and balance the competing policies—that of its own state and that of the foreign state—and choose the one it deems fairest and most just.⁷³ This decision is a political one, properly to be made by the legislature, not the court. A court has no right to reject or change the policy of the state. Moreover, to do so in this manner may be most discriminatory. The state's (the forum's) policy may be modified in conflict situations, but not in purely domestic cases; if the policy is deemed an unwise or unfair one, why should it not be changed for all situations, local and foreign?⁷⁴

70. Currie, *supra* note 62, at 243-8; Currie, *supra* note 55, at 249-51, 259-63; Currie, *On the Displacement of the Law of the Forum*, 58 COLUM. L. REV. 964, 1001-28 (1958); Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9 (1958). For a different and contrary viewpoint see: Freund, *Chief Justice Stone and the Conflict of Laws*, 59 HARV. L. REV. 1210 (1946); Cheatham, *Federal Control of Conflict of Laws*, 6 VAND. L. REV. 581 (1953); Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1 (1945); Overton, *State Decisions in Conflict of Laws and Review by the United States Supreme Court under the Due-Process Clause*, 22 ORE. L. REV. 109 (1943); Speidel, *Extraterritorial Assertion of the Direct Action Statute: Due Process, Full Faith and Credit and the Search for Governmental Interest*, 53 NW. U.L. REV. 179, 194-5, 224-5 (1958); Notes, 35 COLUM. L. REV. 751 (1935); 45 YALE L.J. 339 (1935).

71. See Barrett, *The Doctrine of Forum Non Conveniens*, 35 CALIF. L. REV. 380 (1947); Barrett, *Venue and Service of Process in the Federal Courts—Suggestions For Reform*, 7 VAND. L. REV. 608 (1954); Braucher, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908 (1947); Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1 (1929); Currie, *Change of Venue and the Conflict of Laws*, 22 U. CHI. L. REV. 405 (1955); Comment, 25 U. CHI. L. REV. 377 (1958); Note, 58 COLUM. L. REV. 234 (1958); Note, 56 YALE L.J. 1234 (1947); Note, 42 CALIF. L. REV. 690 (1954); EHRENZWEIG, CONFLICT OF LAWS §§ 34-8 (1959).

72. Currie, *supra* note 62, at 229-32, 244; Currie, *On the Displacement of the Law of the Forum*, 58 COLUM. L. REV. 964, 1012-26 (1958); Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9 (1958).

73. See note 70 *supra*.

74. Thus courts sometimes abrogate or severely limit policies deemed outmoded in local as well as foreign applications. Cf. *In re Grainger*, 121 Neb. 338, 237 N.W. 153 (1941); *Hunt v. Authier*, 28 Cal.2d 288, 169 P.2d 913 (1946). To limit an obsolete policy for foreign situations only, and leave it in effect for purely local situations, seems hardly fair to local persons. See *Herzog v. Stern*, 264 N.Y. 379, 384, 191 N.E. 23, 25, *cert. denied*, 293 U.S. 597 (1934). If the policy is a moribund relic,

At first glance, this proposition comes as somewhat of a shock. After all, we now recognize that courts do make policy for a state, do make law, do make political, social, economic policy decisions. In fact many policies of a state—common-law ones—are almost entirely judge-made. Why should not a court similarly make policy and law in a true conflicts case? Why should it not decide to what extent foreign factors in a given situation should or should not alter the state's policy for purely local situations of a like kind?

The answer, I think, is perhaps a complex one. First, we have here a clash, not of individual, social or public, and group interests, as in a purely local situation where courts often make policy. We have here a further clash on a political, interstate or international basis. Local courts have almost always recognized their inability to handle such policy clashes in a satisfactory way. The Supreme Court has carefully refrained from intervention in the broad area of foreign affairs and foreign policy, expressly recognizing that the President and Congress are far better qualified, have far better sources of information, for this type of case.⁷⁵ It has taken a similar approach to "political" questions.⁷⁶ In the second place, I suspect Currie has, no doubt for sound reasons, somewhat overemphasized the lack of any policy-making in his approach. Actually, I believe, there is far more present than perhaps would appear at first glance.

There must still be considerable weighing and assessment of clashing policies here—but it will be made by different organs, or at different

should it not be completely abrogated? Yet courts do utilize choice-of-law rules here so as to abrogate such policies only in conflict situations, not domestic ones. Cf. *Thompson v. Taylor*, 66 N.J.L. 253, 49 Atl. 544 (1901); *Bowles v. Field*, 78 Fed. 742 (C.C. Ind. 1897); *International Harvester Co. v. McAdam*, 142 Wis. 114, 125, 124 N.W. 1042, 1046 (1910). See Currie, *supra* note 55, at 250 n. 49, 260-1 (1958); Currie, *supra* note 62, at 230 n. 82, 251 (1957). For a contrary position, see Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 YALE L.J. 736, 748 (1924); Lorenzen, *Tort Liability and the Conflict of Laws*, 47 L.Q. REV. 483, 490 (1931); Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 192 (1933); Cook, "Contracts" and the Conflict of Laws: "Intention" of the Parties, 32 ILL. L. REV. 899, 919 (1932); Yntema, *The Objectives of Private International Law*, 35 CAN. BAR REV. 721, 738 (1957); Freund, *Chief Justice Stone and the Conflict of Laws*, 59 HARV. L. REV. 1210, 1214-5, 1216, 1223 (1946).

75. Cf. *United States v. Pink*, 315 U.S. 203 (1942); *C. & S. Air Lines v. Waterman Corp.*, 333 U.S. 103 (1948); *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918); *United States v. Bush & Co.*, 310 U.S. 371 (1940); *United States v. Curtiss-Wright Corp.*, 299 U.S. 304 (1936); *United States v. Belmont*, 301 U.S. 324 (1937); *Wilson v. Girard*, 354 U.S. 524 (1957). *But cf.* *Kent v. Dulles*, 357 U.S. 116 (1958); *Dayton v. Dulles*, 357 U.S. 144 (1958).

76. Cf. *South v. Peters*, 339 U.S. 276 (1950); *Colegrove v. Green*, 328 U.S. 549 (1946); *Coleman v. Miller*, 307 U.S. 433 (1939); *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849); *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1866); *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50 (1867); *Taylor and Marshall v. Beckham* (No. 1), 178 U.S. 548 (1900). See Carrington, *Political Questions, The Judicial Check on the Executive*, 42 VA. L. REV. 175 (1956); HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 192-210 (1953).

times, or in different ways than by a court simply choosing between the law of the forum and the law of another state. A court obviously must decide if the alleged policy of the state is in fact an existing one. The state must have an ascertainable policy, suitably expressed in its law. Next, in seeking out the reasons and governmental interests behind a state's policy, obviously a court must to a certain extent weigh and evaluate the innumerable reasons and interests which speculation and conjecture and imagination can conjure up to alert counsel and judges. Some will simply be dismissed as too fantastic, too improbable, in default of concrete evidence to the contrary. Others will be eliminated as highly unlikely. A court is bound to undertake some weighing, some valuation, some assessment of the rationality and legitimacy of the seemingly endless reasons and governmental interests which may possibly lie behind a state's policy, and to eliminate those that are too unlikely. Third, a court can and should weigh and evaluate the rationality of the asserted connection between the reasons and interests behind the state's policy and the elements in the given situation related to that state. Is there a legitimate, rational link between the forum's policy reasons and governmental interests and the elements of the case—residence, domicile, place of tort—connected with the forum? This of necessity involves evaluation. The alleged link between the state's policy and reasons and governmental interests involved therein and the elements of the case related to the state may be irrational, illogical, too tenuous, too remote or hypothetical.⁷⁷ As already suggested,⁷⁸ in our federal system, failure of a state court to perform properly these tasks may violate the Constitution. A court must weed out unsound, irrelevant reasons and interests alleged to be behind a state's policy, must reject application of the policy to a foreign situation where the local elements do not create a strong enough tie to the real reasons and interests behind local policy to warrant application of the policy to the given case. Moreover, as already noted, many alleged conflict situations disappear when this type of analysis is made. There is no real clash of different policies of two states, because the policies may be basically the

77. Cf. *Grubel v. Nassauer*, 210 N.Y. 149, 103 N.E. 1113 (1913); *McDonald v. Mabee*, 243 U.S. 90 (1917); *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930) (Here forum's only connection was that it was the domicile, but not the residence, of an assignee of the insured); *John Hancock Ins. Co. v. Yates*, 299 U.S. 178 (1936) (Forum's only connection was that the beneficiary, the widow of the insured, moved to forum after insured's death; forum may not label issue of denial of recovery for material misrepresentations one of procedure, controlled by forum's law, when application of foreign law caused forum's courts no inconvenience and did not interfere with any policy of forum relating to administration of its courts); *Sovereign Camp v. Bolin*, 305 U.S. 66 (1938) (Here in fact the forum's alleged policy for protecting its residents was nonexistent at the critical period, see *Currie*, *infra* note 88.) In both the last two cases the asserted state policy appears to have been nonexistent.

78. See p. 536 *supra*.

same (differing only in minor, irrelevant details),⁷⁹ or clearly only the policy of one state may be at all affected by the outcome of the case, or the policy of neither state may apply, or the reference to foreign law may not involve a reference to ascertain a rule of decision—the policy, and the reasons and interests involved therein.

Moreover, as already suggested, legislatures can do much here by specifying the scope of statutory policies in time and space.

Despite its obvious resemblances to the so-called “grouping of contacts” or “center of gravity” theory,⁸⁰ there are differences, quite basic, between this theory and the thesis here advocated. The “grouping of contacts” theory makes little attempt to eliminate or weed out irrelevant factors—those which give a state no really legitimate rational connection with the case in question. Nor does it separate true from false conflict situations—the spurious conflict cases where in reality only one state, or perhaps neither state in question, has a legitimate reason for applying its policy. Nor does it distinguish situations where the foreign element and policy is a subsidiary matter and those where it is the decisive rule of decision. On the other hand, the grouping of contacts suggests there is a mechanical weighing, quantitatively or qualitatively, of the contacts in one state against those in the other, in order to apply the law or policy of that state having a preponderance of the contacts grouped in it.

Under our thesis, we must determine whether the possible connections of the forum with the given case, as viewed in the light of the reasons (or governmental interests) behind the forum’s policy, are so slight or remote or speculative as to be ignored or disregarded, as not to warrant application of the forum’s policy to this case. We must make a similar determination for any other state that allegedly has a connection with our case. Only if both states have legitimate reasons and interests for applying their policies to the given case, because of the elements in the case related to each state, and only if the policies of these states really differ and clash, is there a true conflicts situation (assuming we seek a rule of decision in the state’s policy).

Obviously, there are matters of degree here. What if we strongly dislike the policy of one state, the forum, believe it outmoded, irrational, an anachronism, a relic of the past, as compared to the modern enlightened policy of the other state? Will there not be a strong temptation, by hook or by crook, somehow to prefer the policy of the latter state? Certainly this cannot be denied. Moreover, if we recognize and appreciate fully the fact that we are often dealing with policies here which, under the mask or guise of a broad public social interest, actually re-

79. See note 12 *supra*.

80. See note 54 *supra*; *W. H. Barber Co. v. Hughes*, 223 Ind. 570, 63 N.E.2d 417 (1945); *Rubin v. Irving Trust Co.*, 305 N.Y. 288, 113 N.E.2d 424 (1953); Comment, *Place of Most Substantial Contacts*, 64 HARV. L. REV. 1363 (1951).

fect and represent comparatively narrow selfish group interests, we may, as judges, be strongly inclined to reject a local policy, benefiting a small, powerful group at public expense, in favor of another state's policy which curbs this group interest for the benefit of the interest of a far larger group or of the public as a whole. Yet there is great danger here that judges will allow their personal views and opinions as to wise policy to control their choices. Also, the result here is often that an undesirable local policy is rejected in cases with foreign factors, but not in cases with purely domestic similar situations—an unfair discrimination against the latter.⁸¹

V

This thesis raises other fundamental questions. Does it dangerously ignore certain basic interests, peculiarly important in the field of conflict of laws, such as the need for uniformity of results, for certainty and predictability of decisions, for vindication of the legitimate expectations of the parties, for promoting a general legal order, fostering amicable relations among states?⁸²

It is quite possible that often conflict of laws has given far too much weight to these interests. Thus complete uniformity is clearly impossible without some super authority, some *supreme* supreme court, capable of imposing its views upon all the world. No one advocates such an extreme measure—individuality and localism have their values too in our society. Indeed, one wonders if individualism is not in danger of being smothered by powerful group and state authorities in many aspects of our life. In so far as uniformity depends on cooperative action by individual states, this is obviously not a matter for courts to handle—alone they can do little here. The courts of any one state cannot insure that the courts of another state will decide a like case in the same way. Moreover, on what basis may a state court reject its local policy, especially if embodied in a legislative enactment, in favor of a foreign state's policy?

In a federal system, should the answer lie with the federal courts? Is it not their function to handle clashes between the states as members of the federal system? I feel that in diversity litigation, there is much to be said for rejection of the *Erie* rule in so far as choice-of-law rules are concerned.⁸³ Yet, much as one may dislike⁸⁴ the results of the *Erie* rule in

81. See note 74 *supra*. This is true only when it is the forum's policy which is deemed moribund. If the policy of the foreign state is deemed moribund, in a true case of clash of policies, the forum will apply its own law; absent a clash of policies, the forum obviously has no business abrogating outmoded policies of other states.

82. See notes 8, 20-30 *supra*.

83. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938); *Klaxon Co. v. Stentor Co.*, 313 U.S. 487 (1941); *Griffin v. McCoach*, 313 U.S. 498 (1941). See Currie, *Change of Venue and the Conflict of Laws*, 22 U. CHI. L. REV. 405, 467-9, 502-3 (1955); Currie, *supra* note 55, at 266; Mishkin, *The Variousness of "Federal Law": Compe-*

situations where the state courts have failed to analyze the choice-of-law problems in the terms here suggested, and much as one might hope that the federal courts would be more apt to adopt the analysis here proposed if given independence, the fact is that it is hard to see how a federal court can develop any criteria for choosing rationally between clashing legitimate state policies in true conflicts situations. The federal court is hardly in a better position than the state courts to make such a choice. Actually, the federal court is a forum which has no policy in any way affected by the case and therefore no good reasons to apply its own law—there are no elements in the case which give the federal court a legitimate choice-of-law connection with the case—and so the federal court is simply called upon to choose between the conflicting policies of two or more other states, each of which has a legitimate cause for applying its policy because of the reasons and interests behind that policy and the elements in the case local to it. Absent congressional guidance, what else can the federal court do except follow the policy, even if misguided, of the state in which it sits (assuming that policy does not violate the Constitution)? If state courts would adopt the approach here suggested, application of the *Erie* rule is sound—is indeed the one sensible solution. If state courts do not adopt this approach, unless the Constitution is thereby offended, it is difficult to propose rejection of the *Erie* rule unless one feels that federal courts would be more apt than state courts to adopt the analysis herein proposed. Even then the federal court would be in the unenviable position of having to guess about the policies (and the reasons and interests involved therein, and the extent thereof) of two or more other states, and presumably would follow the policy of that state in which it sits if that state has a legitimate cause, because of factors local to it and the reasons and interests behind its policy, for applying its policy.⁸⁵ Also, rejection of the *Erie* rule here would not, of course, secure uniformity in state courts, which would

tence and Discretion in the Choice of National and State Rules For Decision, 105 U. PA. L. REV. 797 (1957); Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489 (1954); Wolkin, *Conflict of Laws in the Federal Courts: The Erie Era*, 94 U. PA. L. REV. 293 (1946); Kurland, *Mr. Justice Frankfurter, The Supreme Court and the Erie Doctrine in Diversity Cases*, 67 YALE L.J. 187 (1957); Cook, *The Federal Courts and the Conflict of Laws*, 36 ILL. L. REV. 493 (1942); Braucher, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908 (1947); Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 YALE L.J. 267 (1946); Barrett, *Venue and Service of Process in the Federal Courts—Suggestions for Reform*, 7 VAND. L. REV. 608 (1954); Hill, *The Erie Doctrine and the Constitution* (pts. 1-2), 53 NW. U.L. REV. 427, 541 (1958); HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 633-6, 668-72 (1953).

84. There may be other reasons for rejection or modification of the *Erie* rule, such as solution of difficult problems arising out of change of venue in the federal courts (see Currie, *Change of Venue and the Conflict of Laws*, *supra* note 83) and proper handling of cases where there is no real clash of conflicting state policies or where the law of the states other than the forum is not looked to for a rule of decision (see notes 10-2, 16-8 *supra*).

85. Currie, *infra* note 88; Currie, *supra* note 55, at 262, 266.

still be free to follow their own choices, nor, judging by past experience, would state courts be apt voluntarily to adopt federal views here.

As already indicated, I do not believe that the Supreme Court should interfere on constitutional grounds with state court decisions where there are real conflicts of state policy, where several states have legitimate reasons and interests, based upon their connections with the case, for applying their own local policies. The Court should intervene here under due process and full faith and credit, absent further congressional action, only, I think, where there is no real conflict, where a state with no rational basis for doing so, viewed in the light of its connection with the case and its policy and the reasons and interests involved therein, attempts to apply its policy. The Court should also act to prevent unfair retroactive action or unfair discrimination against foreign residents or claims, when necessary.

It is significant, I think, that when the Court has tried to do more, has tried to dictate which of two states each with a rational connection with a case, should alone have the right to apply its policy, the Court has usually subsequently retreated. Often it seems to me the Court has gone astray through failure to recognize the various clashing interests—especially the group and social interests—which gave rise to the conflicting policies of the states in question. Certainly the performance of the Court when it has tried to dictate an absolute single choice of law rule gives one little reason to believe that this is a task suited to its abilities. Moreover, the present Supreme Court already faces such a tremendous load of litigation, that it is hard to see how it could find the time necessary to take on an assignment as difficult, as complex, as demanding, as this. Nor is this a task well suited for judicial treatment. State policies are involved—yet the states themselves will seldom, if ever, be directly represented by counsel in arguments before the Court—private parties and their counsel will control the argument and litigation. In addition, these policies represent compromises of conflicting social, group, and public interests, and it is certainly doubtful if a court is equipped to afford adequate hearing to all these clashing and varied interests. Ordinary adversary, two-party litigation simply cannot fully and adequately inform the Court of the scope and extent of the issues.

Perhaps it is significant that the areas where the Court has been most active here are precisely those areas where the interrelationships of individual, group, and social interests are most complex and have developed most rapidly. And, almost without exception, the Court, after false starts, has sharply curtailed its role, as it realized more fully the complex interests behind the conflicting state policies.⁸⁶

86. See note 41 *supra*. I assume that full faith and credit applies to decisional or common law of a sister state as well as statutes. See *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 436 (1943). Further, I assume that there is a denial of due process if the decisional law of a state, as well as its statutes, is applied when the

Thus, in the first case⁸⁷ involving conflicting workmen's compensation laws of two states, the Court required the forum, the state of injury, under the full faith and credit clause to apply the law and policy of the state of employment and residence of the employee to bar a wrongful death action. Perhaps the result may be explained on the ground that so far as a wrongful death action was concerned—at least one which gave damages solely to heirs and dependents, not the estate—the state of injury has no real reason for applying its wrongful death statute merely because the fatal injury there occurred, unless heirs or dependents of deceased are residents of the forum. No local creditors can be aided by such a statute.⁸⁸ The reasoning of the Court, however, was far broader and seemed to say that in workmen's compensation cases the policy of one state only could constitutionally be applied to any given situation. Such an approach gives too little heed to the complex and varied interests involved—the individual interests of employer and employee, the group interests of workers and employers, the group interests growing out of the probable presence of insurance which spreads the risks over a group, the social and public interests involved in obtaining goods at lower prices and also in not having to provide funds to support indigent injured workmen and their dependents. In the very next case⁸⁹ involving conflicting state workmen's compensation laws, which came before it only three years later, the Court, although reaching a result in accord with the earlier case, spoke in entirely different language, stressing the interests involved, the reasons and interests behind each state's policy, the connection between the policy of each state and

state has no legitimate connection with or interest in the case. I also assume that, although usually the question is whether the forum by applying its own law and policy has denied due process or refused full faith and credit, yet it is equally possible for the forum to deny due process by applying the law of some other state which lacks any legitimate connection with the case. Cf. *Young v. Masci*, 289 U.S. 253 (1933); RESTATEMENT (SECOND), CONFLICT OF LAWS 20 (tent. draft 3, 1956). *But cf.* EHRENZWEIG, CONFLICT OF LAWS 12 (1959). See Currie, *supra* note 62, at 238-9.

87. *Bradford Elec. Co. v. Clapper*, 286 U.S. 145 (1932).

88. See *id.* at 162, 163; *Davis v. Herbert*, 78 N.H. 179, 97 Atl. 879 (1916); Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9 (1958). Possibly the forum has a legitimate connection even here because one reason for its policy may be to discourage negligent conduct within the forum. Cf. *Gordon v. Parker*, 83 F. Supp. 40 (D. Mass. 1949).

89. *Alaska Packers Assn. v. Industrial Accident Comm.*, 294 U.S. 532 (1935). In workmen's compensation cases, courts of the forum are extremely reluctant to apply foreign law even if the forum's statute clearly does not apply. See Note, *Enforcement in One Jurisdiction of Right to Compensation under Workmen's Compensation Act of Another Jurisdiction*, 6 VAND. L. REV. 744 (1953). Thus the forum may deny a plaintiff all relief and dismiss the case if it decides the forum's law is inapplicable, even if the plaintiff is clearly entitled to relief under the law of another state, because the forum will not administer the workmen's compensation law of another state. *But cf.* note 100 *infra*. This factor may well be a strong factor in allowing the forum to apply its own law here, at least so far as the Constitution is concerned.

the elements of the case local to that state. Subsequent cases⁹⁰ have reiterated this approach and also made it plain that the Court will not attempt to choose which one of several states with different policies each of which has a rational connection with a factor local to that state, shall be the only state whose policy may be applied. Instead, the Court permits each of these states to apply its policy, recognizing that the complex interests behind these conflicting state policies make the choice of any one state's policy here a matter not suitable for judicial determination.

In *Carroll v. Lanza*,⁹¹ the most recent case, the opinion makes another important point. So far as the Constitution is concerned, it need not be shown in *each* situation that the elements local to the state *actually, in fact*, have operated in such a manner as to constitute a rational link with the state's policy and the reasons and interests involved therein. It is enough if there is a reasonable probability of the existence of such a connection in such a situation. Thus, it is immaterial if in fact the injured person in question did not incur hospital, doctor, and medical bills for treatment in the state where injury occurred, because of the probability that such persons will often do so. Therefore the state of injury in tort cases has a sufficient connection to warrant application of its statutory policy allowing direct suit against a liability insurer. The Court will not be so particularistic as to inquire if the injured person in fact became a burden to the state where the injury occurred. A generalized reason, predicated on probability, is enough. The basis for the link between the elements in the state and the state's policy and reasons and interests involved therein may be somewhat conventionalized.

Should state courts follow a similar approach—to do so would simplify the task of judges by permitting the formulation of standard rules and obviating the need for specific inquiry in each individual case. Yet such inquiry might often serve to avoid a clash or conflict with the contrary policies of other states, so moderation and restraint might often induce a state court to proceed cautiously if counsel in fact show

90. *Pacific Employers Ins. Co. v. Industrial Accident Comm.*, 306 U.S. 493 (1939); *Carroll v. Lanza*, 349 U.S. 408 (1955). Cf. *Cardillo v. Liberty Mut. Ins. Co.*, 330 U.S. 469 (1947); *Lauritzen v. Larsen*, 345 U.S. 571 (1953); *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959); *Ohio v. Chattanooga Boiler & Tank Co.*, 289 U.S. 439 (1933); *Collins v. American Buslines, Inc.*, 350 U.S. 528 (1956). See Wellen, *Workmen's Compensation, Conflict of Laws and the Constitution*, pts. I & II, 55 W. VA. L. REV. 131, 233 (1953); Hogan, *Constitutional Implications of Workmen's Compensation and Choice of Law*, 7 HASTINGS L.J. 268 (1956); Langschmidt, *Choice of Law in Workmen's Compensation*, 24 TENN. L. REV. 322 (1956); Stone, *The Forum's Policy and the Defense of Full Faith and Credit to Workmen's Compensation Acts*, 41 IOWA L. REV. 558 (1956); Comment, 33 TEX. L. REV. 917 (1955); Comment, 23 U. CHI. L. REV. 515 (1956); Note, 106 U. PA. L. REV. 472 (1958); Note, *The Supreme Court, 1954 Term*, 69 HARV. L. REV. 119, 133 (1955); Note, 54 MICH. L. REV. 552 (1956).

91. 349 U.S. 408, 413, 420-1 n. 3 (1955). Here the injured employee was at once removed to a hospital in the state of his residence.

a lack of an actual link in the case in question between the elements in that state and its policy and the reasons and interests involved therein, even if such a link might ordinarily or would often exist. What about the converse situation—where a link actually exists in a situation where normally there would be none, where there is little probability of one as a rule? One doubts if the Constitution should operate here to prevent application of a state's policy under such a circumstance. But certainly again a state court would be wise to exercise restraint and moderation to avoid a conflict with policies of other states. Even so, where counsel plainly show the existence of such a link, despite its high degree of improbability, one wonders if a court is not apt to apply its local policy in order to achieve what seems a fair result, if the court is kindly disposed toward the state policy in question.

Commercial insurance is another field where the Court has long been active with often puzzling and apparently contradictory results. Thus in the famous *Dodge*⁹² case the language of the opinion seems to proceed on the basis that for the forum to apply its law to an insurance loan contract "made" in another state with a resident of the forum, is contrary to the Constitution. Perhaps, as Professor Currie suggests,⁹³ the true explanation of the case is that the statute of the forum involved had in fact been repealed before the "loan contract" in question was made. If so, it is hard to explain the *Liebing* case,⁹⁴ where the opposite result was reached because the loan agreement was considered "made" in the forum, although here too the statute had been repealed prior to the making of the loan agreement. In any event, earlier and later cases⁹⁵ in

92. *New York Life Ins. Co. v. Dodge*, 246 U.S. 357 (1918).

93. Currie, *supra* note 88. See the *Dodge* case, *supra* note 92, at 367 n. 1.

94. *Mutual Life Ins. Co. v. Liebing*, 259 U.S. 209 (1922).

95. *Cf. Equitable Life Assurance Soc. v. Clements*, 140 U.S. 226 (1891); *Orient Ins. Co. v. Daggs*, 172 U.S. 557 (1896); *New York Life Ins. Co. v. Cravens*, 178 U.S. 389 (1900); *American Fire Ins. Co. v. King Lumber Co.*, 250 U.S. 2 (1919); *John Hancock Ins. Co. v. Yates*, 299 U.S. 178 (1936) (see note 77 *supra*). In the area of public law, as to aspects of insurance regulation (statutes involving, not the relations between the parties to the insurance contract, but the relation of the state to the insurer, its agent, or the insured), compare *Allgeyer v. Louisiana*, 165 U.S. 578 (1897) with *Hoopston Co. v. Cullen*, 318 U.S. 313 (1943). In the *Allgeyer* case, the forum had no legitimate reason for imposing a penalty on a resident (who merely dealt with an insurer) in order to collect a license tax from the insurer who underwrote a "risk" within the forum but did not "do business" in the forum. The resident acted within the state to effect insurance on property there with an insurer not licensed to do business there. Today the forum's policy might well be sustained as a legitimate effort to provide a local court for local residents insured by foreign corporations. *Cf. McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957).

See also *Mutual Life Ins. Co. v. Cohen*, 179 U.S. 262 (1900); *Mutual Life Ins. Co. v. Hill*, 193 U.S. 551 (1904)—both cases involving *non-constitutional* choice-of-law problems, where the Court refused, quite properly, to apply the law of the place of incorporation of the defendant insurer, which allowed recovery, contrary to the policy of the forum, the home state of the insured and the beneficiary. *Cf. Munday v. Wisconsin Trust Co.*, 252 U.S. 499 (1920).

the insurance field use very different language—recognizing and stressing the rational connection of the statutory policy and reasons and interests involved therein with the factors in the case present in the forum or state whose law was held to be properly applied.

In the *Head* case,⁹⁶ where the Court struck down an application of the forum's statute to a policy loan contract, it did so on the ground that there was no rational connection between the statutory policy of non-forfeiture and the local factors (the original insurance contract was applied for and delivered in the forum) in the situation. A similar result was reached in the *Dick* case.⁹⁷ The *Dunken* case⁹⁸ perhaps may be explained on the ground that it involved an attempt by the forum to apply its statutory policy to a contract made at a time when the forum had absolutely no connection with the situation—only after a valid contract was made did the insured move to the forum. The *Delta*⁹⁹ case again appears to lay down a rigid rule that constitutionally only one state—the place where the contract is made—may apply its law to determine rights under an insurance contract. The Court ignored the many factors in the case local to the forum (such as domicile of the insured) which rationally linked the forum's statutory policy to the situation. In the *Griffin* case,¹⁰⁰ the Court went to the very verge—some would say over the verge—in order to find a possible reason or interest linking the local factors of the case to the forum's statutory policy and the reasons and interests involved therein, and on this basis upheld the right of the forum to apply its policy. If the Court had attempted any weighing of state policies here, it surely would have struck down the one upheld, that of Texas, the forum.

96. *New York Life Ins. Co. v. Head*, 234 U.S. 149 (1914). *Cf.* *Western Union Tel. Co. v. Chiles*, 214 U.S. 274 (1909).

97. *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930). See Note, 71 HARV. L. REV. 674 (1958). *Cf.* *Lauritzen v. Larsen*, 345 U.S. 571 (1953); *Romero v. International Terminal Operating Co.*, *supra* note 90. *But cf.* *Bournias v. Atlantic Maritime Co.*, 220 F.2d 152 (2d Cir. 1955); Note, 55 COLUM. L. REV. 1072 (1955).

98. *Aetna Life Ins. Co. v. Dunken*, 266 U.S. 389 (1924). If the forum's statute be viewed not as enlarging the obligation originally assumed by the insurer, but only as a reasonable regulation of future actions by insurers in settling claims of local residents, then the forum did have a legitimate reason to apply its policy to contracts made before passage of the forum's statute or with which the forum originally had no connection whatsoever. *Cf.* *Funkhouser v. Preston Co.*, 290 U.S. 163 (1933). The same result can then be reached by terming the forum's policy a procedural matter. *Cf.* *Klaxon Co. v. Stentor Co.*, 313 U.S. 487 (1941).

99. *Hartford Ind. Co. v. Delta Co.*, 292 U.S. 143 (1934). Plaintiff, the insured, was, in fact, incorporated and doing business in the forum, which was not allowed to apply its policy to the case, although the loss occurred there. *Cf.* *Griffin v. McCoach*, 313 U.S. 498 (1941); *Milliken v. Meyer*, 311 U.S. 457 (1940); *Union Trust Co. v. Grosman*, 245 U.S. 412 (1918).

100. *Griffin v. McCoach*, 313 U.S. 498 (1941), *on remand*, 123 F.2d 550 (5th Cir. 1941). Texas was the only state having such a policy, and it changed its policy a few years later. *Cf.* 14 TEX. CIV. STAT. ANN. art. 3.49 (1952); *id.*, art. 3.49-1 (Supp. 1958); CARNAHAN, CONFLICT OF LAWS AND LIFE INSURANCE CONTRACTS 340 (2d ed. 1958).

Finally, in the *Watson* case,¹⁰¹ the latest in this series, the opinion is entirely in terms of the legitimate relationship between the forum's statutory policy and the reasons and interests involved therein, and the factors in the case which are local to the forum. Moreover, the opinions—majority and concurring¹⁰²—recognize that the Constitution does not limit the choice of law to *one* state (the forum) only here—quite the contrary, the opinions recognize that other states in this same case may also apply their different statutory policies because of other factors which link those other states to the case. The Court, again, will not undertake to decide which one, only, of these conflicting state policies may be applied, when each one of the states has sufficient factors in the situation local to it so that there is a rational reason for applying its policy.

Again, I suggest that the Court has gone astray here mainly when it has not realized the complex nature of the varied conflicting interests behind the statutory policies of the states involved. Insurance of necessity involves group interests—the spreading of risks and losses over a definite group. Individual interests of insured and insurer and beneficiary; group interests of insureds and beneficiaries and insurers; public and social interests in vindication of promisees' expectations, in solvency of insurance companies, in protection of citizens against hazards and risks so that they will not become dependent on public funds—all these are interwoven in a complex strand. As the Court has gained a clearer appreciation of the varied nature of all these interests, so it has wisely abdicated any role which would compel it to choose which state policy is preferable when several states' policies may rationally be applied because of the reasons and interests behind policies and the factors in the case local to each state.

The fraternal insurance cases at times seem to reveal a complete misapprehension of the nature of the group interest involved—as in the spurious application of the doctrine of class actions.¹⁰³ In general, however, the Court has rather consistently ruled that the state of incorporation has such an overwhelming connection with these cases that only its statutory policy may be constitutionally applied, no matter how many other factors there are present in other states which would seem to provide a rational basis for application of the

101. *Watson v. Employers Liability Corp.*, 348 U.S. 66 (1954). Cf. *Klaxon Co. v. Stentor Co.*, 313 U.S. 487 (1941). In *Kryger v. Wilson*, 242 U.S. 171 (1916), there was no real clash of state policies—the laws of both states were substantially alike. In *Selover, Bates & Co. v. Walsh*, 226 U.S. 112 (1912), there was no proof the foreign law differed substantially from the forum's. See Speidel, *Extraterritorial Assertion of the Direct Action Statute: Due Process, Full Faith and Credit and the Search for Governmental Interest*, 53 Nw. U.L. Rev. 179 (1958).

102. See the *Watson* case, *supra* note 101, at 73, 75-6, 82-3.

103. *Sovereign Camp v. Bolin*, 305 U.S. 66 (1938). See note 77 *supra*.

contrary policy statutes of the other states.¹⁰⁴ In the *Wolfe* case,¹⁰⁵ the latest decision, the majority opinion does not deny that other states than the state of incorporation have a legitimate basis because of local factors for applying their different statutory policies. Instead, the opinion¹⁰⁶ purports to weigh and evaluate the policies involved, the reasons and interests therein involved, and the nature of the elements local to each state, and concludes that the state of incorporation must be given preference in order to obtain uniform treatment for all policy holders. I do not question the wisdom of this result, and I sympathize with the Court's desire to act here in the absence of congressional legislation on the subject when action is so badly needed. Yet I do wonder if it was wise for the Court to undertake to make this choice-of-law. Originally, when the first, early cases reached the Court, the fraternal associations were benevolent, non-profit, non-commercial organizations, closely controlled by members through a representative form of government. State policies to protect local residents dealing with commercial insurance companies might well be deemed unnecessary to protect the members. Today, the organizations, grown large, are impersonal, giving members little voice in control or selection of management or its methods, and thus are really very similar to commercial mutual companies.¹⁰⁷ Does the Constitution still bar states where insured members reside from taking steps now to protect their group and individual interests?

The wrongful death action cases—*Hughes v. Fetter*¹⁰⁸ and *First National Bank of Chicago v. United Air Lines, Inc.*¹⁰⁹—again contain language which stresses a rigid constitutional choice-of-law rule requiring the statutory policy of one state only to be applied. But other language

104. *Royal Arcanum v. Green*, 237 U.S. 531 (1915); *Modern Woodmen v. Mixer*, 267 U.S. 544 (1925). Cf. *Hartford Life Ins. Co. v. Ibs*, 237 U.S. 662 (1915); *Hartford Life Ins. Co. v. Barber*, 245 U.S. 146 (1917); *Sovereign Camp v. Bolin*, 305 U.S. 66 (1938). *But cf.* *National Mutual B. & L. Ass'n. v. Brahan*, 193 U.S. 635 (1904). See Note, 57 *YALE L.J.* 139 (1947); Harper, *The Supreme Court and the Conflict of Laws*, 47 *COLUM. L. REV.* 883, 898 (1947). In the *Brahan* case the Court allowed the forum to apply its law about usury to a contract made elsewhere by a foreign building and loan association with a resident of the forum. Actually, the forum exempted domestic associations from this statutory policy. Query if the policy would not be an unreasonable discrimination or perhaps a nonexistent policy, unless foreign associations possessing the same statutory safeguards as domestic firms regarding usury and also properly qualified to do business in the forum, were not also exempted.

105. *Order of Travelers v. Wolfe*, 331 U.S. 586 (1947). See Currie, *supra* note 88. *But cf.* *Trammel v. Brotherhood of Locomotive Firemen*, 126 *Mont.* 400, 253 *P.2d* 329 (1953); *Order of United Commercial Travelers v. Duncan*, 221 *F.2d* 703 (6th Cir. 1955).

106. *Wolfe* case, *supra* note 105, at 624-5.

107. See the *Wolfe* case, *supra* note 105, at 625, 629-41 (dissenting opinion).

108. 341 U.S. 609 (1951).

109. 342 U.S. 396 (1952).

in these cases ¹¹⁰ and the decision in the *Wells* case ¹¹¹ suggest that such restrictions on choice of law were not in fact intended. The Court was worried more about unfair discrimination against foreign claims or non-residents, the related but quite separate problem of the effect of

110. *Hughes v. Fetter*, *supra* note 108, at 612 n. 10; *First Nat. Bank v. United Air Lines, Inc.*, *supra* note 109, at 398. *Cf.* *Tenn. Coal Co. v. George*, 233 U.S. 354 (1914); *Atchison, T. & S.F. Ry. v. Sowers*, 213 U.S. 55 (1909); *Chambers v. Baltimore & O. R.R.*, 207 U.S. 142 (1907). See HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM*, 635-6, 668-72 (1953); EHRENZWEIG, *CONFLICT OF LAWS* 32-3, 136-7 (1959); Note, 61 *YALE L.J.* 1206 (1952); Reese, *Full Faith and Credit to Statutes: The Defense of Public Policy*, 19 *U. CHI. L. REV.* 339 (1952).

There are two distinct but related problems here. First, may the forum, in view of the reasons and interests involved in its statutory policy and because of the elements in the case local to the forum, constitutionally apply that policy (denying plaintiff relief) to this case, even if the contrary policy and reasons and interests involved therein of another state (allowing plaintiff relief) may also be applicable because of the elements in the case local to that second state? Here, if the forum lacks a sufficient relationship to the case, it should not be allowed to deny (or grant) relief contrary to the applicable policy of another state. *Cf.* *Holzer v. Deutsche Reichsbahn-Gesellschaft*, 277 N.Y. 474, 14 N.E.2d 798 (1938); *Griffin v. McCoach*, 313 U.S. 498 (1941). Denial of relief may often prevent all recovery by plaintiff, if as a practical matter suit can be brought only in the forum. *Cf.* *Ciampittiello v. Ciampittiello*, 134 Conn. 51, 54 A.2d 669 (1947); *Kentucky v. Paramount Exch.*, 262 U.S. 544, 549-50 (1923). Often it is also difficult to ascertain if the forum dismissed the case on the merits or not. *Cf.* *Angel v. Bullington*, 330 U.S. 183 (1947); *Union Trust Co. v. Grosman*, 245 U.S. 412 (1918); *Treinius v. Sunshine Min. Co.*, 308 U.S. 66 (1939).

In the second situation, even if the forum's policy and reasons and interests involved therein would usually warrant application of its policy to the case because of the local elements in the case, the forum may decline to try the case in its courts for policy reasons allegedly related to the proper administration of its courts. Different considerations may be involved in the second situation when even though the laws and policies of the forum and the other state are not in conflict at all, the forum refuses for reasons related to administration of its judicial system to have its courts hear a case with certain foreign elements. Legitimate policies of the forum about judicial administration may well deserve recognition here and entitle it to refuse to hear such a case. For a different approach, however, see: *Cheatham*, *supra* note 41; *Freund*, *supra* note 28, at 1227; *Paulsen & Sovern*, *supra* note 26, at 979-80, 1016; *Langmaid*, *supra* note 41, at 418-9; *Ross*, *supra* note 41, 15 *MINN. L. REV.* 161; HANCOCK, *TORTS IN THE CONFLICT OF LAWS* 39, 54 (1942).

111. *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 518-9 (1953). *Cf.* *Carroll v. Lanza*, 349 U.S. 408 (1955); *Watson v. Employers Liability Corp.*, 348 U.S. 66 (1954). In the *Wells* case, where the forum was allowed to apply its own statute of limitations, the forum was the principal place of business of the defendant in the wrongful death action (the injury occurred elsewhere). It clearly had legitimate reasons to apply its policy to protect its judicial processes and its residents against stale claims and evidence made unreliable by the passage of time. *Cf.* *Klaxon Co. v. Stenor Co.*, 313 U.S. 487 (1941) (Forum was also state of incorporation of defendant); *Young v. Masci*, 289 U.S. 253 (1933) (Uphold application of policy of one state with legitimate connection with case even if another state with a contrary policy has a legitimate connection as well); *Scheer v. Rockne Motors Corp.*, 68 F.2d 942 (2d Cir. 1934). *Compare* *Western Union Tel. Co. v. Chiles*, 214 U.S. 274 (1909) *with* *Western Union Tel. Co. v. Commercial Milling Co.*, 218 U.S. 406 (1910). *But cf.* *Western Union Tel. Co. v. Brown*, 234 U.S. 542 (1914). In the *Chiles* case, the forum, where the message was sent, was not allowed to apply its law imposing a penalty for non-delivery. There is no evidence that the addressee, who was the plaintiff, was domiciled or resident in the forum, and the improper delivery

the Constitution upon the right of access to state courts in "transitory" causes of action having foreign elements.

It seems to me that choice among conflicting state policies here is not one that can wisely and suitably be made by any court, state or federal. The federal courts can prevent unfair discrimination against non-residents, or unfair retroactive application of state policies, or irrational application of state policies to situations where there are no factors local to the state which warrant application of its policy, in the light of the reasons and interests behind that policy. If a choice must be made here where there is a clash of state policies both of which have a legitimate basis for application to the case in question, then I believe the primary responsibility for making the choice is that of Congress. The clashing interests—individual, group, social—behind the conflicting state policies are simply not amenable to the present-day judicial or administrative process, without some intelligent and rational guidance from the legislature.

Perhaps there is an analogy here to certain administrative law problems.¹¹² When a legislature delegates vast, sweeping, ill-defined powers to an agency and simply tells the agency to solve a difficult social, political, or economic problem in some manner which is "in the public interest" or is "fair and equitable," with no more guidance to the agency about the choices to be made among many alternatives, then the agency is all too apt to flounder about, to vacillate, to render inconsistent and unfair and discriminatory rulings, to be captured by strong group or industry interests. The legislature, in all fairness, must offer the agency some guidance, some definite specific goals, some indication of its preferences among the many available choices. Similarly, in the field of conflict of laws, in true cases of clashes of state policies we cannot and should not expect judges alone to do the impossible, to handle this huge task unassisted, to choose rationally among clashing policies of sovereign states. The legislature must and should provide some intelligent guidance. Not that the job, at best, will be an easy one even for a legislature. Certainly Congress will be wise to proceed slowly here, to deal with specific subjects or policy conflicts rather than to enact broad choice of law rules. I doubt if Congress should act here at all at present (and I suspect it will not act) except in a few, narrow, specific fields. But it can and should make an intelligent start. Congress¹¹³ can act in areas such

occurred outside the forum. In the *Commercial Milling* case the forum, where the message was sent, was allowed to apply its law to give damages to the sender (apparently domiciled in the forum) for improper delivery outside the forum. In the *Brown* case the forum was not allowed to award the addressee damages for a telegram sent from the forum and improperly delivered elsewhere. The domicile or residence of the plaintiff is not indicated.

112. See note 7 *supra*.

113. See Cook, *The Powers of Congress under the Full Faith and Credit Clause*, 28 YALE L.J. 421 (1919); Jackson, *Full Faith and Credit—The Lawyer's Clause of*

as fraternal insurance,¹¹⁴ workmen's compensation,¹¹⁵ commercial insurance,¹¹⁶ perhaps the legality of declaration of corporate dividends.¹¹⁷ There is no question of subordinating rights of states to federal law, but rather simply of stating which one of several conflicting state policies shall prevail in a true conflicts situation.

State legislatures, as already noted, can and should do their part. They can make explicit the policy of the statute and the extent of its application to promote this policy. In enacting a statute they can clearly specify often the extent to which the statutory policy is meant to apply to cases with foreign factors, the extent in time and space of its application, what are the elements which must be local to carry out the legislative policy, which elements need not be local or must even be universal if the legislative policy is to be fully realized.¹¹⁸ Such specifications must be drafted carefully, rationally, with moderation¹¹⁹ and restraint. If so handled, such drafting may well emphasize the basic policy involved, the reasons therefor, the clashing interests—individual, group, public—at stake, and perhaps lead to reconsideration of even wholly local policy problems and elimination of outmoded ideas. Also, states must check any desire to impose their policy upon the entire world.

Ascertainment and implementation of policy is a difficult job for judges under the best of conditions. They need all possible help from

the Constitution, 45 COLUM. L. REV. 1, 21 (1945); Cavers, Book Review, 56 HARV. L. REV. 1170 (1943); *Yarborough v. Yarborough*, 290 U.S. 202, 215 n. 2 (1933) (dissenting opinion); Currie, *supra* note 55, at 266-8; Currie, *supra* note 62, at 245-6. *But cf.* notes 118-9 *infra*.

114. See notes 103-7 *supra*.

115. See notes 87-91 *supra*.

116. See notes 92-102 *supra*.

117. See Coleman, *Corporate Dividends and the Conflict of Laws*, 63 HARV. L. REV. 433 (1950); Hawkland, *Control of Foreign Corporate Activity by the State of Incorporation*, 6 MIAMI L.Q. 41 (1951); Note, 40 COLUM. L. REV. 1210 (1940); Hohfeld, *Nature of Stockholders' Individual Liability for Corporation Debts*, 9 COLUM. L. REV. 285 (1909); Hohfeld, *The Individual Liability of Stockholders and the Conflict of Laws*, 9 COLUM. L. REV. 492 (1909), 10 *id.* 283, 520 (1910).

118. I do not refer to enactment of traditional choice-of-law rules, rules which say which law of which state shall govern in a conflicts case, such as the law of the place of injury, of contracting, or performance, etc. *Cf.* Stimson, *Simplifying the Conflict of Laws: A Bill Proposed for Enactment by the Congress*, 36 A.B.A.J. 1003 (1950); Sumner, *Choice of Law Governing Survival of Actions*, 9 HASTINGS L.J. 128, 143 (1958). Such proposed statutes would be most unfortunate, I think. What I have in mind is a specification by the legislature that its statutory policy—as survival of tort actions, protection of married women—is intended to govern certain cases with stipulated foreign elements, or to control only cases with stipulated local elements, giving an indication of the extent to which the statutory policy is meant to apply to cases with foreign factors. See notes 31-2 *supra*; Currie, *supra* note 55, at 258-9; Currie, *supra* note 62, at 246-8.

119. There has been imperialistic lack of restraints at times. *Cf.* Rheinstein, *The Place of Wrong: A Study in the Method of Case Law*, 19 TUL. L. REV. 4 (1944); Rheinstein, *Conflict of Laws in the Uniform Commercial Code*, 16 LAW & CONTEMP. PROB. 114 (1951); CALIFORNIA LAW REVISION COMMISSION, RECOMMENDATION AND STUDY, *supra* note 62.

legislatures. The legislatures can state policies in such a way as to reveal significant factors behind the policies. Courts can then apply the law and policy in such a way as best to effectuate it.

The courts too have a definite role here. That of the federal courts I have already noted—to prevent rank, unfair discrimination against foreign claims and non-residents, or the provincial, arbitrary, irrational application of the law of the forum or of any state whose policy, in view of the reasons and interests involved therein, has no rational connection with the factors local to the forum or the state in question. The federal courts should determine if the asserted state policy does in fact exist, and that the real reasons and governmental interests behind it give a not too technical or attenuated basis for applying it to the instant case in view of the factors in the case local to this state. State courts, too, have an important function. When the state legislature is silent, theirs is the task of determining the extent in time and space of their state's policy. Where there is no possibility of conflict with the policy of other states, they can often exercise an enlightened and rational altruism and extend their state policy and its benefits to all parties irrespective of residence, to all claims irrespective of time or location or who is involved, subject to constitutional limitations. If there is a state policy to place upon local industry all social costs of the enterprise the policy may be followed even if the place of injury is extra-state or the victim is a non-resident.¹²⁰ In other situations they can avoid conflicts with policies of other states by a restrained, moderate, enlightened interpretation and construction of their local policy (and statutes) and the reasons and interests involved therein, by disregarding irrelevant differences in formalities between local and foreign policies, by seriously investigating to ascertain if often the policy of the other state is not basically the same as local policy.¹²¹ Enlightened, restrained interpretation here can minimize conflicts problems and contribute to a stable legal order.

120. *Compare* Schmidt v. Driscoll Hotel, 249 Minn. 376, 82 N.W.2d 365 (1957), with Eldridge v. Don Beachcomber, Inc., 342 Ill. App. 151, 95 N.E.2d 512 (1950). So, too, we have generally not discriminated against non-resident aliens, even when constitutionally possible. Cf. Mulhall v. Fallon, 176 Mass. 266, 57 N.E. 386 (1900); Disconto Gesellschaft v. Umbreit, 208 U.S. 570 (1908); United States v. Pink, 315 U.S. 203 (1942); Clark v. Allen, 331 U.S. 503 (1947); Janusis v. Long, 284 Mass. 403, 188 N.E. 228 (1933); Nadelmann, *Creditor Equality in Inter-State Bankruptcies: A Requisite of Uniformity in the Regulation of Bankruptcy*, 98 U. PA. L. REV. 41 (1949); Nadlemann, *Legal Treatment of Foreign and Domestic Creditors*, 11 LAW & CONTEMP. PROB. 696 (1946); Comment, 18 U. CHI. L. REV. 329 (1951). See Alaska Packers Ass'n. v. Industrial Acc. Comm., 1 Cal.2d 250, 255, 34 P.2d 716, 719 (1934), *aff'd*, 294 U.S. 532 (1935). *But cf.* 77 PA. STAT. ANN. (1952 & 1958 Supp.) § 563; Coules v. Pharris, 212 Wis. 558, 250 N.W. 404 (1933).

121. See note 12 *supra*. Cf. Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401, 435 (1928): "What are likely to be crucial in the development of any body of statutory law are the presumptions with which courts approach debatable issues of interpretation. For it is these presumptions which control decision when a legislature has failed to address itself to an issue and to express itself unmis-

State courts often have much leeway in determining state policies and the reasons and interests involved therein. In cases of doubt, borderline ones, it may well be that the forum's court will be inclined to extend the reach of a local policy deemed modern and contemporary, or to restrict the scope of a local policy deemed outdated and a historical hangover. And, to a certain extent, the court will no doubt, despite the dangers involved, be inclined to prefer a policy of a state which seems to have a major connection with the case in question over the policy of a state which at best has only a relatively minor connection,¹²² or to favor a policy which benefits the public at large instead of a policy which sacrifices that public interest to the selfish needs of a small but powerful group.

VI

One final point. Is Currie correct in arguing that in all true conflict cases of clashing state policies the forum should apply its own law (as well as in those cases where neither the forum nor any other state involved has any real policy applicable to the given case, unless the reasons and interests behind the forum's policy clearly reveal its inapplicability to situations with foreign factors—the gap situation)? This rule will be a definite and certain one—the forum will always apply its own law here. There will be few if any troublesome problems of *renvoi* or characterization. Reference to foreign law and policy will be only to internal law.

Will there be too much forum-shopping then? The answer here is twofold. First, the possibilities of forum-shopping are apt to be exaggerated in many situations.¹²³ As a practical matter, there are not many situations where the plaintiff has more than a few forums available for suit against a defendant. Delay in hope of catching the defendant while he temporarily is in a certain state may be a dangerous game. Second, the remedy for forum-shopping, after all, is not logically found in choice of

takably about it. If the interpretive presumptions of the courts are founded on principles and policies rationally related to the ultimate purposes of the social order, then statutory law will tend to develop the coherence and intelligibility, and the susceptibility to being reasoned about, which a body of unwritten law tends always to have. Otherwise, it will tend to become a wasteland of arbitrary distinctions and meaningless detail.

"Legislatures in our tradition have depended heavily upon the assistance of courts in giving statutory law this kind of in-built rationality. The articulation and use of interpretive presumptions by the courts is an essential means of providing this assistance. It involves no impairment of legislative prerogative, but, on the contrary, facilitates the legislature's work rather than hinders it. It serves to focus issues, to sharpen responsibilities, and to discourage buck-passing. It gives assurance that a legislature's departure from generally prevailing principles and policies will be a considered one."

122. See notes 74-81 *supra*.

123. See Currie, *supra* note 62, at 244-5. Cf. *Curry v. States Marine Corp.*, 118 F. Supp. 234, 235 (S.D.N.Y. 1954).

law rules which only indirectly attack the problem. If there is a real evil here, if plaintiffs enjoy too much freedom, may not the most effective remedy be the most direct one—changes in our rules about the place of trial for “transitory” actions, further application of the doctrine of *forum non conveniens* in a fair and intelligent manner,¹²⁴ restrictions on the concept of personal service as a basis for jurisdiction over defendants?¹²⁵

Still, one may be troubled by a lack of sufficient emphasis here on such considerations as certainty, predictability, and uniformity of result as a major goal in true choice of law cases in conflicts.¹²⁶ Thus one can certainly argue with much force that a basic interest in our social and economic and political system, underlying countless statutes and common-law judge-made rules and policies, is that wherever possible, without undue sacrifice of other equally basic interests, our legal system should endeavor to make certain that the normal, reasonable, legitimate expectations of persons are achieved instead of frustrated.¹²⁷ In a sense, this idea is basic to our concept of the binding nature of contracts—men should normally be required to keep promises which they have seriously made in good faith and which others rightfully rely upon. The reasonable expectations of promisees should be vindicated; bargains should be enforced. There is a fundamental interest—individual, group, and social—at stake here. If so, should we not usually presume that a legislature normally does not intend to disregard this key interest any more than is absolutely necessary to carry out other policies, and that therefore the legislature expects judges, in the absence of explicit language to the contrary, to interpret statutory language, otherwise sweeping and all-inclusive, in such a way as to encroach upon this interest as little as possible? Even so, in certain cases—and more and more in modern

124. See notes 71, 110 *supra*. Cf. *Elliott v. Johnston*, 365 Mo. 881, 292 S.W.2d 589 (1956).

125. See Rheinstein, Book Review, 41 MICH. L. REV. 83, 91 (1942); Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The “Power” Myth and Forum Conveniens*, 65 YALE L.J. 289 (1956); EHRENZWEIG, CONFLICT OF LAWS §§ 25, 30, 34-41 (1959); Comment, 10 VAND. L. REV. 438 (1957); note 110 *supra*.

126. See Griswold, *Renovi Revisited*, 51 HARV. L. REV. 1165, 1184-5 (1938); Griswold, *In Reply to Mr. Cowan’s Views on Renovi*, 87 U. PA. L. REV. 257, 261 (1939); Goodrich, *Public Policy in the Law of Conflicts*, 36 W. VA. L.Q. 156 (1930); *supra* notes 8, 20-30. But cf. Rheinstein, *The Place of Wrong: A Study in the Method of Case Law*, 19 TUL. L. REV. 4, 29-30 (1944); Harper, *Policy Bases of the Conflict of Laws: Reflections on Rereading Professor Lorenzen’s Essays*, 56 YALE L.J. 1155, 1159 (1947); Freund, *Chief Justice Stone and the Conflict of Laws*, 59 HARV. L. REV. 1210, 1211, 1236 (1946); Katzenbach, *Conflicts on An Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law*, 65 YALE L.J. 1087, 1097-111 (1956).

127. See Rheinstein, *The Place of Wrong: A Study in the Method of Case Law*, 19 TUL. L. REV. 4, 17-25 (1944); Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1 (1943); Pound, *Individual Interests of Substance—Promised Advantages*, 59 HARV. L. REV. 1 (1945); POUND, AN INTRODUCTION TO PHILOSOPHY OF LAW, ch. 6 (rev. ed. 1954). See also note 3 *supra*.

life—we know the legislature does intend to curtail the normal expectations of parties, to limit their right to contract and bargain—but at least we can insist that the legislature in these situations speak plainly and to the point if it desires such limitations to apply to situations with non-local elements in them. No doubt the legislature, to prevent easy evasion and subversion of its policies, can curtail the power of the parties to choose the law applicable to their contract or transaction, but we should not lightly infer such a legislative wish.

No doubt predictability is also an essential element for our legal order, and to some extent this may depend upon uniformity of decision. Yet predictability is always a guess at best, no matter how uniform our rules may be, especially in choice of law situations—there are too many ways to avoid rules causing disliked results. Also, no doubt we can say that one of our usual expectations in our present social order is that regardless of where a law suit is tried, the outcome should normally be the same. The mere fact that state *A* rather than state *B* is the forum, especially in our federal system, is scarcely viewed by most people as an adequate reason of itself for reaching a different decision if all other facts are the same (which they very seldom are, as a practical matter—judges, juries, counsel, witnesses, all may differ). To press the argument even further, perhaps it even shocks our sense of fairness, arouses our sense of injustice,¹²⁸ to discover that the accidental or deliberate choice of one forum instead of another may of itself change the outcome of the suit. Further, perhaps, are there not other factors here—the promotion of a general legal order, the fostering of amicable relations between states?

At most, though, I think the matter is one of relative emphasis here. In ascertaining and determining the policy of any state—forum or any other—a legislature and, to a lesser extent perhaps, a court must keep in mind certainly such interests as those in uniformity, amicable interstate relations, the vindication of promised or expected advantages. These factors must be borne in mind whenever the state's policy and reasons and interests involved therein are being shaped and determined by court or legislature in any alleged or potential conflicts situation. We should proceed with care and caution before deciding that there is a true clash of conflicting state policies in a given case involving elements local to each state only. Intelligence and moderation and reason can do much to avoid conflicts of states over policies. But some such conflicts will and do occur, and when we find them, we must face up to them honestly. And here I question if a court should, except in the most extraordinary circumstances, ever deliberately subordinate its local policy to that of another state. Certainly it should not do so unless con-

128. See CAHN, *THE SENSE OF INJUSTICE* 20-1 (1949).

vinced of the strong probability that by so doing, by so sacrificing local policy in a narrow, limited, specific area, there will result the desired uniformity and promotion of a reasonably stabilized and civilized general legal order.¹²⁹ The price to be paid is a heavy one, so the expected result must be not only desirable but highly probable.¹³⁰ Probability, however, is apt to be slight here. Unilateral action by the courts of one state to subordinate local policy to the policy of another state in order to achieve uniformity, must be based upon the expectation that other states will adopt the same rules about the extent in time and space of their policies and apply them consistently—an expectation which may very well prove to be unfounded. Courts cannot, of course, like legislatures, engage in bargaining through multi-lateral or bilateral compacts, treaties, or agreements. Even if they could, it may be doubted if real bargaining is possible here. If a real choice of law situation is involved, what quid pro quo can one state receive for sacrificing its legitimate policy, except if other states will agree in other and different areas of clashing policies to subordinate their policies to those of the forum? But how could one rationally justify such trading off of rights in one area for rights in another area?¹³¹

Our ordinary choice of law rules—place of making, of performance, of injury—certainly do not, it seems to me, bring about these results. They have not, they cannot, achieve uniformity. They confuse conscientious judges, and obscure the real issues—the clashing interests which result in the conflicting state policies.

A court should, I think, respect the position of the legislature, state or Congress, as the chief policy-determining agency of our society. In interpreting a statutory policy, the court must not, of course, give words a meaning they cannot bear. Nor can it adopt any meaning which violates any established purpose, clearly stated. In this connection a court should not infer a legislature as ordering a departure from a generally prevailing principle or policy unless it clearly does so. Moreover, in inferring the purposes or reasons or interests behind policies, the court, in the absence of clear contrary evidence, may ordinarily presume that the policy is not meant to be imposed upon the entire world, that normally the policy or reasons or interests involved therein are designed to avoid, not create, clashes with policies of other states, and also to pro-

129. Perhaps the enforcement by the forum of foreign modifiable alimony decrees is an example of this type of situation. Cf. *Worthley v. Worthley*, 44 Cal.2d 465, 283 P.2d 19 (1955); *Harrison v. Harrison*, 214 F.2d 571, 574 (4th Cir. 1954); Note, 53 HARV. L. REV. 1180 (1940); Annot. 132 A.L.R. 1272 (1941); Scoles, *Enforcement of Foreign "Non-Final" Alimony and Support Orders*, 53 COLUM. L. REV. 817 (1953); Comment, *Interstate Recognition of Alimony Decrees*, 41 CALIF. L. REV. 692 (1953).

130. See Currie, *supra* note 88. Currie, *On the Displacement of the Law of the Forum*, 58 COLUM. L. REV. 964, 1007-9 (1958); Currie, *supra* note 55, at 246-7.

131. See Currie, *supra* note 55, at 263-5.

mote uniformity and predictability. These general policies of the law may well operate here in the absence of a specific reason or interest or specific policy to the contrary.

Does this approach constitute an improper abdication by judges of their duties and responsibilities? Often a purported refusal to decide a question, to express a preference for one solution rather than another, a referral of a problem to the legislature for action, really amounts to a refusal by the judges to face up to their responsibility to decide a tough, demanding case. It also ignores the fact that there is no such thing as a refusal by a court to decide a question—someone always wins or loses, gains or benefits, when the court refuses to act or refers the matter to the legislature. Furthermore, legislatures are busy, and frequently a hope that a legislature will act is a highly unrealistic one.

These objections do not, it seems to me, apply here. So far as a state court is concerned, there is no abdication of its judicial function. It must determine the policy, statutory or otherwise, for the issue raised and the reasons and governmental interests involved in that policy, and whether those reasons and interests warrant extension of the policy in time and space to the particular case in view of the mixed nature—foreign and local elements—of the case. When there is no good cause for applying local policy to the mixed case, it must determine if there is another state whose policy for good cause should be applied in view of the factors present local to that other state. If not, it applies its local policy, unless the policy plainly is not suited for such a mixed case. This is certainly a judicial function. If the court desires to go further and reject the policy because it is outmoded or harmful, this, too, it may do, provided it is done for all types of cases, both purely local and mixed ones—not for mixed cases alone. What the court should not do is the non-judicial function of rejecting in mixed cases alone, the policy always applied in purely local cases when there is no valid cause, so far as the reasons and interests behind the policy are concerned, for any such discrimination.

Nor do I believe there is an abdication by the federal courts of their responsibility in our federal system if, when there are valid reasons and governmental interests for applying the different local policies of two or more states to a given case because of elements in the case local to each state, the courts do not attempt to prefer one state's policy over those of all others. The courts fulfill their function if they strike down rank, unfair discrimination against non-local claims and non-local persons, and also attempts by any state without a clearly specified policy or without a good cause, because of the reasons and governmental interests behind local policy, for applying that policy to a given case in view of the absence of any factors local to that state which reasonably warrant application of that state's policy. This is the proper role of the courts in our federal system.